Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JANET C. MANGINI,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), preempts a suit to enjoin, under a state statute prohibiting "unfair" business practices, cigarette advertising allegedly targeted at minors.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Supreme Court were petitioner R.J. Reynolds Tobacco Company ("Reynolds"), petitioner RJR Nabisco Inc. ("RJR Nabisco"), petitioner McCann Erickson USA, Inc., petitioner Young & Rubicam Inc., and respondent Janet C. Mangini. No other party appeared in any proceeding below. Pursuant to Supreme Court Rule 29.1, the following list names all parent companies and subsidiaries (except wholly owned subsidiaries) of each petitioner:

Reynolds, which is owned by RJR Nabisco, has the following partly-owned subsidiaries: China-American Cigarette Company Limited; Litografia A. Romero, S.A.; Outdoor Traders International S.r.L.; R.J. Reynolds Berhad; R.J. Reynolds Espana, S.L.; R.J. Reynolds ISMA; R.J. Reynolds/M.C. Tobacco Company, Limited; R.J. Reynolds (Portugal) Empressa Commercial de Tabacos Ltds.; RJR-Petro; and Sunrise Biosystems, Inc.

RJR Nabisco, which is owned by RJR Nabisco Holdings Corp., has the following partly-owned subsidiaries (apart from those held through Reynolds): Cia Arturo Field Y La Estrella Ltda., S.A.; Establecimiento Modelo Terrabusi S.A.; Gelatinas Ecuatorianas S.A.; Grupo Gamesa, S.A. de C.V.; Landers Centro Americana Fabriantes de Molinos Marca "Corona," S.A. de C.V.; Mahachai Holding Co. Ltd.; Nabisco/Cetus Food Biotechnology Research Partnership; Nabisco International M.E./Africa; Nabisco (Thailand) Limited; Royal Brands, S.A.; Sociedade Brasileira Beneficiadora de Cha' Ltda.; West Indies Yeast Company Ltd.; and Yili-Nabisco Biscuit & Food Company Limited.

McCann Erickson is owned by The Interpublic Group of Companies, Inc.

Young & Rubicam has the following partly-owned subsidiaries: Creswell, Munsell, Fultz & Zirbel, Inc.; Sive/Young & Rubicam, Inc.; Black, Manafort, Stone & Kelly, Inc.; Gold & Liebengood, Inc.; and Landor Associates, Inc.

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PETITION FOR A WRIT OF CERTIORARI

R.J. Reynolds Tobacco Company ("Reynolds"), RJR Nabisco Inc. ("RJR Nabisco"), McCann Erickson USA, Inc., and Young & Rubicam Inc. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 7 Cal. 4th 1057, 875 P.2d 73, 31 Cal. Rptr. 2d 358 (1994) and is reprinted at pages 1a to 21a of the appendix to this petition. The opinion of the California Court of Appeal is reported at 22 Cal. App. 4th 628, 21 Cal. Rptr. 2d 232 (1993) and is reprinted at pages 22a to 43a of the appendix to this petition. The order of the trial court granting summary judgment to petitioners (defendants below) is unreported. That order is reprinted at pages 44a to 45a of the appendix to this petition.

JURISDICTION

The judgment of the California Supreme Court was entered on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Petitioners recite that 28 U.S.C. § 2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15 U.S.C. § 1331:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> > (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
> >
> > (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 US.C. § 1334(b):

> No requirement or prohibition based on smoking and health shall be imposed under State law with

respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

STATEMENT

This case presents the question whether Section 5(b) of the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), 15 U.S.C. § 1334(b), preempts a suit to enjoin, under a state statute prohibiting "unfair" business practices, cigarette advertising allegedly targeted at minors. That question depends on whether a state-law prohibition of such advertising is "based on smoking and health" within the meaning of Section 5(b). In holding that such a prohibition is not "based on smoking and health," the opinion below is inconsistent with this Court's preemption decisions and conflicts with *Vango Media Inc. v. City of New York*, No. 93-7607, 1994 U.S. App. LEXIS 23709 (2d Cir. Aug. 26, 1994).

In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), a majority of this Court held that tort claims for failure to warn, when asserted with respect to health warnings omitted from cigarette advertising, are "based on smoking and health," and therefore preempted by Section 5(b). *See id.* at 2621-22 (plurality opinion); *id.* at 2636-37 (Scalia, J., concurring in the judgment in part and dissenting in part). A plurality, however, contended that tort claims for fraudulent misrepresentation, even if asserted with respect to health statements made in cigarette advertising, are not "based on smoking and health," and therefore not preempted by Section 5(b). *See* 112 S. Ct. at 2623-24 (plurality opinion). Five Justices predicted that the plurality's fine analytical distinctions between failure to warn claims and fraudulent misrepresentation claims would prove unmanageable. *See id.* at 2631 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision."); *id.* at

2638 (Scalia, J.) (plurality's analysis "raises more questions than it answers" and "will fill the law-books for years to come"). That concern has proved well-founded, as the conflict between this case and *Vango Media* makes clear.

On January 7, 1992, respondent Janet Mangini filed a complaint against petitioners in state court. The complaint sought to enjoin under California law the "Old Joe Camel" advertising campaign used by petitioner Reynolds to promote its Camel brand of cigarettes.[1] Respondent alleged that this advertising campaign constituted a statutorily prohibited "unfair business practice," [2] because certain of Reynolds' promotional materials failed to warn that "cigarettes pose a health hazard." Pet. App. 54a. As a remedy for this alleged unfairness, respondent sought to compel petitioners to undertake a "corrective advertising campaign on television" and a "corrective print media campaign" in order to "warn consumers of the health hazards associated with cigarette smoking." Pet. App. 55a, 56a.[3]

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[1] Petitioner RJR Nabisco is the corporate parent of Reynolds. Petitioners McCann Erickson USA, Inc. and Young & Rubicam Inc. are advertising agencies that have helped Reynolds develop the "Old Joe Camel" campaign.

[2] Section 17200 of the California Business and Professions Code prohibits "unfair competition," which it defines to include, in pertinent part, "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."

[3] The factual assertions in respondent's complaint, like her statement of claims and prayer for relief, made repeated reference to the alleged health risks of smoking. *E.g.*, Pet. App. 48a ("Old Joe Camel advertisements . . . do *not* contain the required warnings that cigarettes pose lethal health hazards."); Pet. App. 49a ("Virtually every authority and expert in the world . . . recognizes that cigarettes are lethal."); *id.* ("In the United States cigarettes will kill more people in a year than all the deaths from crack, heroin, alcohol, homicides, suicides, car accidents and AIDS combined."); Pet. App. 51a ("The tobacco industry is dying. Every day its products kill thousands of its best customers.").

Shortly after this Court decided *Cipollone*, petitioners moved for summary judgment on the ground that respondent's claims were expressly preempted under Section 5(b) of the Labeling Act, which provides that:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b). *See* Pet. App. 44a. The trial court agreed with petitioners and held that respondent's claims were preempted. Pet. App. 44a-45a.

The California Court of Appeals reversed. On appeal, respondent asserted for the first time that the Old Joe Camel advertising campaign was "unfair" because it "targets minors for the purpose of inducing and increasing their illegal purchases of cigarettes." Pet. App. 27a.[4] The Court of Appeal held that this alleged targeting, although not "deceptive, untrue or misleading," is nonetheless "unfair." Pet. App. 32a-34a. The court reasoned that cigarette advertising targeted to minors "offends public policy" as established by two California statutes: Penal Code Section 308, which prohibits the sale of cigarettes to minors and which, the court held, "reflects a statutory policy of protecting minors from addiction to cigarettes"; and Health and Safety Code Section 25967, which prohibits the non-sale distribution of cigarettes and smokeless tobacco to minors and which expressly declares that preventing minors from using tobacco " 'shall be among the highest priorities in disease prevention for the State of California.' " Pet. App. 34a (citation omitted). The court held further that even apart from these statutory prohibitions, targeted advertising is "unfair" because it "exploits minors by luring them into an *unhealthy* and

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[4] The court permitted respondent to raise this "new" targeting theory, "intended to replace the existing theory of the complaint, which is preempted under *Cipollone*." Pet. App. 27a-31a.

potentially life-threatening addiction." *Id.* (emphasis added). Despite this analysis, however, the Court of Appeal held that respondent's unfair targeting claim is not "based on smoking and health" within the meaning of Section 5(b). Pet. App. 36a-38a.[5]

The California Supreme Court granted review on the preemption question and affirmed. The court recognized that respondent's claim clearly satisfies at least four of the five requirements for preemption under Section 5(b): respondent seeks to impose (i) a "requirement or prohibition" (ii) "under State law" (iii) concerning the "advertising or promotion of . . . cigarettes" that (iv) carry the federally mandated warning labels. Pet. App. 12a-13a. But despite acknowledging the "health concerns that fuel this lawsuit" (Pet. App. 15a), the court held that respondent's unfair targeting claim is not "based on smoking and health." Pet. App. 12a-13a.

In so doing, the court characterized as "dispositive" the analysis of fraudulent misrepresentation claims advanced by the *Cipollone* plurality. Pet. App. 13a. The *Cipollone* plurality had asserted that fraud claims, even if specifically directed at health statements made in cigarette advertising, are not "based on smoking and health" within the meaning of Section 5(b), because they rest "on a more general obligation—the duty not to deceive." 112 S. Ct. at 2623-24 (plurality opinion). In explaining why it would examine the predicate duty on its face, rather than as applied in a particular case, the plurality invoked the statement of policy in the Labeling Act, which seeks to protect commerce from "diverse, nonuniform, and confusing" cigarette advertising regulations (15

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[5] The Court did find preempted respondent's alternative theory, also raised for the first time on appeal, that Old Joe Camel advertisements "glamourize cigarette smoking to minors without disclosing the ill effect of smoking." Pet. App. 31a-32a.

U.S.C. § 1331(2)(B)).[6] Fraud claims would not frustrate that purpose, the plurality reasoned, because "state law proscriptions on intentional fraud rely only on a single uniform standard: falsity." 112 S. Ct. at 2624 (plurality opinion).[7]

The California Supreme Court extended this reasoning to respondent's claim of unfairly targeted advertising, which it characterized as not "based on smoking and health," but on a "more general" duty "to not engage in unfair competition by advertising illegal conduct." Pet. App. 14a. Moreover, the court concluded that Section 308, the underlying legal prohibition against selling tobacco to minors, itself was not "based on smoking and health." In so doing, the court refused to consider the express health-based declarations contained in the text of Section 25967, the second statute cited by the Court of Appeal, or in the recent legislative history of Section 308 itself. Pet. App. 15a ("Although the legislature has certainly spoken about the dangers of smoking, we do not rely on those provisions in finding no preemption."). The court also reasoned that the "original version" of Section 308 was enacted in 1891, "long before current health concerns, and specifically the health concerns that fuel this lawsuit, arose"; and that Section 308 appears in a chapter of the Penal Code titled "Offenses against Good Morals." *Id.* Therefore, the court concluded, "the state's protective role, and not primarily health concerns, motivated the prohibition against selling cigarettes to minors."

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[6] The Labeling Act declares as the "policy of the Congress," in pertinent part, that "commerce and the national economy" should not be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331.

[7] The plurality also reasoned that Congress, by preserving the jurisdiction of the Federal Trade Commission to regulate deceptive cigarette advertising (15 U.S.C. § 1336), "offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." 112 S. Ct. at 2624 (plurality opinion).

Id. Finally, the court asserted that " 'state law proscriptions' against advertisements targeting minors 'rely only on a single, uniform standard': do not target minors." Pet. App. 14a-15a (quoting *Cipollone*, 112 S. Ct. at 2624 (plurality opinion)).

REASONS FOR GRANTING THE WRIT

Three aspects of the California Supreme Court's decision warrant review. First, the court treated unfair targeting claims as being subject only to facial preemption scrutiny. Second, the court concluded that the statutory prohibition on the sale of tobacco to minors, which it deemed to be the legal predicate of respondent's claim, is not "based on smoking and health" because the statute has an arguably non-health, as well as a health, justification. And third, the court applied these principles even in a case involving injunctions. The first ruling substantially alters the settled preemption jurisprudence of this Court, the second ruling conflicts with the Second Circuit's recent opinion in *Vango Media*, and the third ruling implicates a question at issue in *American Airlines, Inc. v. Wolens*, No. 93-1286 (cert. granted April 4, 1994).

1. The California Supreme Court held that respondent's claim of unfair targeting is subject only to facial preemption scrutiny under Section 5(b). In other words, the court considered only whether respondent's claim ultimately rested on a "predicate legal duty" that itself is not "based on smoking and health" in all circumstances (Pet. App. 12a-13a), but did not seek to determine whether respondent's claim is "based on smoking and health" in the specific circumstances of this case. In short, the court foreclosed all "as applied" scrutiny of whether respondent's unfair targeting claim is "based on smoking and health," and therefore preempted.

The court asserted that this approach was compelled by the analysis of fraud claims advanced by the *Cipollone* plurality. Pet. App. 13a. That analysis, however, is in-

consistent with numerous holdings of this Court, and was itself rejected by a majority of Justices in *Cipollone*. Moreover, in extending that analysis, the California Supreme Court ignored obvious differences between fraud claims, which are based on the uniform and objective standard of falsity, and "unfairness" or "targeting" claims, which are based on novel and subjective standards. If carried to its logical extreme, the court's approach could foreclose "as applied" scrutiny of a wide array of state-law claims or requirements. And since few claims or requirements are "based on smoking and health" on their face, any such approach would ensure precisely what Congress sought to avoid—the creation of "diverse, non-uniform and confusing cigarette labeling and advertising regulations" (15 U.S.C. § 1331(2)).

A. The California Supreme Court's approach of limited facial scrutiny is inconsistent with settled principles in this Court's preemption jurisprudence. For example, in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992), this Court held that a federal statute preempting any state law "relating to [airline] rates, routes or services" (49 U.S.C. App. § 1305(a)(1)) expressly preempts the application of "general consumer protection statutes" to "allegedly deceptive airline fare advertisements." *See* 112 S. Ct. at 2034. The Court specifically rejected the argument that laws of "general applicability," because they do not "relat[e] to rates, routes or services" on their face, could escape express preemption on that basis. *See id.* at 2038.

Similarly, in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), this Court held that a federal statute preempting any law that may "relate to any employee benefit plan" (29 U.S.C. § 1144(a)) expressly preempts general common law fraud claims for allegedly improper processing of claims for employee benefits. *See* 481 U.S. at 43-44. The Court "emphasized that the pre-emption clause is not limited to 'state laws specifically designed

to affect employee benefit plans.'" *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990).

In *Cipollone* itself, a majority of the Court employed an "as applied" analysis under Section 5(b) to find failure to warn claims expressly preempted. The Court held that those claims, although resting on a "general" duty "to inform consumers of known risks," are nonetheless "based on smoking and health" as applied to claims for a failure to provide *health* warnings in *cigarette* advertising. *See* 112 S. Ct. at 2620-21, 2624 & n.27 (plurality opinion); *id.* at 2636-37 (Scalia, J.). The wisdom of this approach is obvious: "there is little reason," as this Court explained in *Morales*, "why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." 112 S. Ct. at 2038. *See also Employment Division, Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring in the judgment) ("[T]here is nothing talismanic about neutral laws of general applicability.").[8]

The *Cipollone* plurality provided a specific and narrow justification for eschewing "as applied" scrutiny of common law fraud claims under Section 5(b): Because those claims "rest only on a single, uniform standard: falsity," permitting fraud claims, even as applied to health representations made in cigarette advertisements, poses no sig-

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[8] Indeed, even in its implied preemption cases, this Court does not limit its scrutiny to the facial validity of challenged state provisions. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (preemption analysis "requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written"). Nor does the Court consider only the facial validity of state or federal laws challenged on other constitutional grounds. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *United States v. O'Brien*, 391 U.S. 367 (1968).

nificant threat of disuniform regulation, the stated policy concern of the Labeling Act. *See* 112 S. Ct. at 2624 (plurality opinion). Five Justices rejected that proposed analytical distinction between fraud claims and failure to warn claims. *See* 112 S. Ct. at 2631 (Blackmun, J.) ("The most obvious problem with the [plurality's] analysis is its frequent shift in the level of generality at which it examines the individual claims."); *id.* at 2636 (Scalia, J.) ("None of the arguments the plurality advances to support its distinction between the two [claims] is persuasive.").[9] The adoption of such a distinction in this case is reason enough to warrant this Court's review.

B. Even accepting the *Cipollone* plurality's facial preemption analysis of fraud claims subject to a "single, uniform standard," the same analysis cannot reasonably be extended to claims of "unfair" advertising.

Respondent's own claim—that Reynolds' advertising targets minors unfairly (Pet. App. 3a)—cannot possibly rest on a "single" or "uniform" nationwide standard. To begin with, this claim is highly novel. Unlike fraud claims, the elements of which have been settled over the course of centuries, unfair targeting claims were first recognized, at least under California law, in this very case. Pet. App. 31a-36a. Must a plaintiff show specific intent to target minors? What sort of evidence, if any, would create a prima facie case of unfair targeting? How would a defendant rebut such a case? These and other questions would have to be resolved as the various state courts begin—or decline—to develop this cause of action. One

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[9] Three Justices agreed with the plurality's conclusion that Section 5(b) does not preempt fraud claims, but rested on the alternative ground that common law damages actions do not impose a "requirement or prohibition" within the meaning of Section 5(b). *See* 112 S. Ct. at 2626-31 (Blackmun, J.). Of course, a majority of the Court squarely rejected that proposition. *See* 112 S. Ct. at 2620-21 (plurality opinion); *id.* at 2634 (Scalia, J.). And in any event, this case involves only injunctive claims under state statutes, not common law damages actions.

cannot suppose that the law in this area will develop uniformly throughout the nation.

Moreover, even if the requirements of an unfair targeting claim were settled, the inherent subjectivity of a gravamen like "targeting," in contrast to the relative objectivity of a gravamen like falsity, all but guarantees disuniformity with respect to how the claim is applied in different places, courts and circumstances. In this case, for example, the California Supreme Court was willing to entertain an unfair "targeting" claim as a matter of California law even though the Federal Trade Commission, after a comprehensive three-year investigation, found no evidence to suggest that the Old Joe Camel advertising campaign "lead[s] more children to smoke or lead[s] children to smoke more." *R.J. Reynolds Tobacco Co.*, F.T.C. No. 932-3162 (June 6, 1994) (Joint Statement of Commissioners Azcuenaga, Owen and Starek).[10]

The California Supreme Court advanced a legal theory under which targeting claims permissibly arise out of a general prohibition against "unfair" trade practices and a specific restriction on the sale or use of tobacco (in this case, to or by minors). Pet. App. 14a ("The predicate duty is not to engage in unfair competition by advertising illegal conduct or encouraging others to violate the law."). That analysis ensures further disuniformity for the simple reason that different states enact different tobacco restrictions. Thus, a cigarette advertisement depicting fictitious characters might prove actionable in California, which has chosen to prohibit smoking by

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[10] As these Commissioners explained:

> The Commission has spent a great deal of time and effort reviewing the difficult factual and legal questions raised by this case, including a comprehensive review of relevant studies and statistics. Because the evidence in the record does not provide reason to believe that the law has been violated, we cannot issue a complaint.

Id.

minors; and a cigarette advertisement depicting office workers might prove actionable in the thirteen states (as of 1990) that have chosen to restrict or prohibit smoking in the workplace; and a cigarette advertisement depicting diners might prove actionable in the one hundred cities and counties that have chosen to prohibit smoking in restaurants; and so on. *Compare, e.g.*, Note, *The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out*, 43 Vand. L. Rev. 491, 498 n.54 (1990) (states prohibiting workplace smoking) *with, e.g., American Survey*, The Economist 28 (April 23, 1994) (municipalities prohibiting restaurant smoking).

Other courts presented with claims such as respondent's may, like the California Court of Appeal, rest entirely upon a general prohibition of "unfair" trade practices, even independently of any specific underlying prohibition. Pet. App. 34a-35a. *See also Cipollone*, 112 S. Ct. at 2637 (Scalia, J.) ("Requirements could be imposed by state executive agencies as well, so long as they were operating under a *general* statute authorizing their supervision of 'commercial advertising' or 'unfair trade practices.' "). Obviously, application of an unfocused claim for "unfair" practices cannot rest on a "single" or "uniform" standard, at least as the *Cipollone* plurality understood that concept.

Finally, the California Supreme Court ignored the uniformity-destroying effect of the private enforcement provisions afforded under "little FTC" statutes in California and elsewhere.[11] These provisions ensure that

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[11] Respondent herself brought suit under a provision of California law permitting "any person acting for the interests of . . . the general public" to seek an injunction against alleged unfair trade practices. Cal. Bus. & Prof. Code § 17204 (West Supp. 1994). Respondent's only allegation of injury was that she is "a resident of the City and County of San Francisco." Pet. App. 53a. Every state has enacted a "little FTC" statute similar to California's, and most states permit broad private enforcement. *See generally*

standards of "targeting" or "unfairness" would be developed not even by fifty different state executive agencies, as Justice Scalia feared, but as a result of nationwide adjudications of claims asserted by potentially thousands of self-appointed private attorneys general.[12]

In sum, the California Supreme Court opinion would permit an indeterminate number of unsettled and subjective "general" state law claims to be asserted in the context of smoking and health. In so doing, the opinion conflicts with the settled preemption jurisprudence of this Court and undermines the protection against disuniformity expressly provided by Section 5(b), at least outside the context of the failure to warn claims addressed by *Cipollone*. Review is warranted to consider this dramatic departure from settled law.

Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437, 446-52 (1991).

[12] Several plaintiffs in other states are already pursuing claims that cigarette advertising unfairly targets minors. The Attorney General of Mississippi has asserted such a claim in *Moore ex rel. Mississippi v. The American Tobacco Co.*, No. 94-1429, which is pending in the Chancery Court of Jackson County, Mississippi. So, too, has the Attorney General of West Virginia in *McGraw ex rel. West Virginia v. The American Tobacco Co.*, No. 94-1707, which was recently filed in the Circuit Court of Kahawha County, West Virginia. And a second private party, like respondent here, is pursuing an unfair targeting claim in *Sparks v. R.J. Reynolds Tobacco Co.*, No. C94-783C, which is pending in the United States District Court for the Western District of Washington. In addition, states and municipalities have threatened legislation to prohibit cigarette advertising that allegedly targets children. *See* Teinowitz & Jensen, *Colorado City May Expel Joe Camel*, Advertising Age 46 (Apr. 11, 1994) (discussing legislation in Snowmass, Colorado); Colford, *Tobacco Marketers Burned by State Plans*, Advertising Age 48 (Mar. 7, 1994) (discussing legislation in Vermont). Similar attacks on cigarette advertising may be expected to proliferate in the wake of the California Supreme Court's decision in this case.

2. In holding that unfair targeting claims based on Section 308, which prohibits the sale of tobacco to minors, are not preempted because Section 308 is not "based on smoking and health" (Pet. App. 15a), the California Supreme Court evaluated the purpose and effect of Section 308 under an incorrect legal standard. Rather than determining whether Section 308 has at least one substantial health-based purpose or effect, as it should have, the court instead determined that Section 308 has at least one additional purpose—enforcing "good morals"—that is (arguably) unrelated to health-based concerns. In this respect, its decision is inconsistent with numerous decisions of this Court and is in direct conflict with the Second Circuit's opinion in *Vango Media.*

In *Perez v. Campbell,* 402 U.S. 637 (1971), this Court definitively rejected the proposition that a state may insulate its laws from preemption review merely by articulating *a* legitimate purpose not inconsistent with the federal scheme. In overruling two prior precedents to the contrary, the Court repudiated as "aberrational" the doctrine that "state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration." *Id.* at 651-52. The Court explained:

> Apart from the fact that it is at odds with the approach taken in nearly all of our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

Id. at 652.

Similarly, in *Gade v. National Solid Wastes Management Ass'n,* 112 S. Ct. 2374 (1992), this Court held that a state statute enacted for one permissible purpose (to promote safety of the public generally) and one

impermissible purpose (to promote the safety of employees) constituted an "occupational safety and health standar[d]" expressly preempted under the Occupational Safety and Health Act, notwithstanding the existence of the one permissible purpose. *See id.* at 2386-88. Citing *Perez*, the Court explained that it has "refused to rely solely on the legislature's professed purpose" and has "looked as well to the effects of the law." *Id.* at 2387.[13]

In *Vango Media*, a panel of the Second Circuit (Newman, C.J., Oakes and Cardamone, JJ.) recently, and unanimously, applied these principles in the context of a Labeling Act preemption claim. *Vango Media* involved a New York City ordinance requiring the display, in connection with cigarette advertising on New York City taxicabs, of specified messages disclosing the alleged health risks of smoking. The ordinance contained findings announcing a legislative concern with both health risks and economic costs allegedly associated with smoking. *See* 1994 U.S. App. LEXIS 23709, at *13. The city argued that the ordinance should be upheld because its economic purpose was not "based on smoking and health." *Id.* But the court looked beyond that presumably permissible purpose, noting its "secondary role" and explaining that, regardless of what purposes were in fact present, "the *effect* of the Local Law would be to educate the public as to the adverse health risks of smoking." *Id.* at *14 (emphasis added). On that basis, and despite the articu-

[13] These principles are also well settled in various related contexts, including field preemption, *see, e.g., English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) ("[E]ven as the Court suggested that part of the pre-empted field is defined by reference to the purpose of the state law in question, it made clear that another part of the field is defined by the state law's actual effect"), and the dormant commerce clause, *see, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) ("[W]hen considering the purpose of a challenged statute, this Court is not bound by 'the name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law") (citations omitted).

lation of a plausible non-health purpose, the court held the ordinance expressly preempted. *See id.* at *21.

Here, by contrast, the California Supreme Court looked no further than the "good morals" purpose asserted by respondent in arguing that Section 308 is not "based on smoking and health." Pet. App. 15a. In short, the court determined not whether *all* prohibited purposes and effects were *absent*, but whether *some* permissible purpose was *present*. Had the court applied the standards compelled by *Perez* and *Gade*, as *Vango Media* did, it would have been forced to conclude that Section 308 is based, at least in significant part, on concerns about smoking and health.

In 1988, the California legislature enacted a sweeping amendment to Section 308, which increased twentyfold the penalty for selling or giving tobacco to a minor (from $10 to $200), and which created an entirely new offense for receiving tobacco by a minor. *See* 1988 Cal. Stat. ch. 1045. The amendment originated as a proposal to enact, in the Health and Safety Code, the general prohibition against distribution of tobacco products now contained in Section 25967. *See* S. Bill No. 1960 (Feb. 8, 1988). The decision to amend the Penal Code instead reflected not an abandonment of health concerns, but simply the desire to "create a new crime." *See* S. Bill No. 1960 (as amended April 4, 1988). The 1988 amendment was considered by the Health and Human Services Committee in the California Senate, and the Public Safety Committee in the California Assembly, both of which confirmed in writing their concern about the alleged health risks of smoking.[14] It was supported by the California

[14] *See, e.g.*, Senate Comm. on Health & Human Services, Staff Analysis of Senate Bill 1960 (undated) ("This bill seeks to reduce the occurrence of diseases caused by tobacco use."); Assembly Public Safety Comm., SB 1960 Bill Analysis Worksheet (June 21, 1988) ("[N]ow that the Surgeon General has discovered that tobacco is more addicting than heroin or cocaine, it is imperative that we keep this addicting product away from children until they have the maturity to deal with the consequences.").

Health and Welfare Agency as a means to "aid in the prevention of chronic diseases associated with smoking." Health Services Comm'n, Health & Welfare Agency, Enrolled Bill Report, at 2 (Sept. 7, 1988). It was urged upon the Governor, by the Senator who had introduced it, as a means to prevent minors from using tobacco "until they are old enough to understand the health consequences of smoking." Letter from Sen. Nicholas Petris to Hon. George Deukmejian (Sept. 6, 1988). And it was sponsored, on similarly explicit health-based grounds, by groups such as the American Cancer Society, the American Lung Association, and the California Medical Association.[15] Finally, when the legislature did enact the general prohibition in the Health and Safety Code originally proposed in the February 8, 1988 bill, it even re-

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[15] *See, e.g.*, Enrolled Bill Report, *supra*, at 1 (American Cancer Society sponsored bill to "prevent morbidity and mortality caused by tobacco use"); Letter from American Lung Association of California to Sen. Art Torres (April 18, 1988) ("Your 'aye' vote sends a clear message NOT to condone an estimated 4,000 children who become new smokers daily—many who would eventually die of a smoking related disease."); Letter from California Medical Association to Sen. Nicholas Petris (Mar. 25, 1988) ("Tobacco giveaways encourage the continued use of a substance which has been demonstrated as extremely harmful to the health."); Letter from California Dental Association to Hon. Larry Stirling, Chairman of Assembly Public Safety Comm. (June 22, 1988) ("The association's members believe that [tobacco] products are addictive and promote several health risks, including oral cancer."); Letter from Association For Retarded Citizens-California to Hon. Larry Stirling (June 24, 1988) ("Smoking while pregnant contributes to low birth rate babies. Low birth weight babies are at risk of being mentally retarded."); Letter from California School Boards Association to Sen. Nicholas Petris (Mar. 11, 1988) (amendment "make[s] sure that young people are not provided access to tobacco and its proven health risks"); Letter from California Congress of Parents, Teachers & Students to Hon. Larry Stirling (June 24, 1988) ("We are very pleased that SB 1960 recognizes the serious health problems being created by the non-compliance of our laws").

duced its health-based concerns to explicit legislative findings.[16]

Under *Perez* and *Gade*, the California Supreme Court was not entitled to ignore the obvious health-based purpose of Section 308, even if a distant predecessor of that provision might have been enacted for different reasons,[17] and even if Section 308—like the statutes at issue in *Gade* and *Vango Media*—continues to serve other purposes as well. Review is necessary to resolve the conflict created by the California Supreme Court decision.

3. Finally, review is also warranted to address a significant issue not considered in *Cipollone*: whether the California Supreme Court's facial preemption analysis, even if otherwise correct in the context of an action for damages, should be extended to claims, like respondent's, for injunctive relief.

Cipollone considered only whether Section 5(b) preempts various common law *damages* actions. At the outset, the Court held that common law *duties* impose a "requirement or prohibition" within the meaning of Section 5(b). *See* 112 S. Ct. at 2620 (plurality opinion);

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[16] *E.g.* Health & Safety Code § 25967(a)(1) (West Supp. 1994) ("Smoking is the single most important source of preventable disease and premature death in California."); *id.* § 25967(a)(5) ("The earlier a child begins to use tobacco products, the more likely it is that the child will be unable to quit."); *id.* § 25967(a)(11) ("It is the intent of the Legislature that keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the highest priorities in disease prevention for the State of California.").

[17] Even that proposition is dubious, for the court was quite wrong that the alleged health risks of smoking were generally unknown when Section 308's original predecessor was enacted. *See, e.g., Austin v. Tennessee*, 179 U.S. 343, 348 (1900) ("[A] belief in [tobacco's] deleterious effects, particularly among young people, has become very general, and . . . communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes.").

id. at 2634 (Scalia, J.). That focus on duties as the source of the "requirement or prohibition" plainly colored the plurality's decision to subject fraud claims only to facial preemption scrutiny. *See* 112 S. Ct. at 2621 ("[W]e ask whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health . . . .'").

In the context of injunctive claims under a statute, a different approach appears necessary. A "general" statute prohibiting unfair business practices plainly imposes a "requirement or prohibition" within the meaning of Section 5(b). But so, too, does an injunction, enforceable by contempt, specifically requiring a cigarette manufacturer to undertake a "corrective" advertising campaign in order to "warn smokers of the health hazards associated with cigarette smoking." Pet. App. 54a. And that "requirement or prohibition" is plainly "based on smoking and health" *on its face*, even if the underlying statutory requirement is not. Thus, review is warranted to determine whether Section 5(b) encompasses a greater preemptive scope when injunctive claims are at issue.

At a minimum, this case should be held for *American Airlines, Inc. v. Wolens*, No. 93-1286 (cert. granted April 4, 1994), a case presenting parallel questions about the permissibility of state injunctions under 49 U.S.C. App. § 1305(a)(1), the express preemption provision at issue in *Morales*. In *Wolens*, plaintiffs filed injunctive and damages claims challenging an airline's modification of its frequent flyer program under a general Illinois statute prohibiting unfair competition. *See* 589 N.E.2d 533 (Ill. 1992). The airline asserted an express preemption defense, arguing that plaintiffs' claims "relate[d] to rates, routes or services" of an airline within the meaning of Section 1305(a)(1). The Illinois Supreme Court held the damages claims not preempted because the unfair competition *statute* did not "itself relat[e] to airline services." *Id.* at 535. At the same time, however, the court

held that an *injunction* "would involve the regulation of defendant's services and therefore violate section 1305." *Id.*[18] This Court has granted certiorari to decide whether, among other questions, "the scope of preemption under . . . Section 1305 depends on the form of relief requested." *See* 62 U.S.L.W. 3653 (U.S. April 5, 1994). Because the Court's analysis of the permissibility of state injunctions under Section 1305(a)(1) could plainly affect, if not determine, whether state injunctions are permissible under Section 5(b), this petition should, at a minimum, be held for *Wolens*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[18] The Illinois Supreme Court adhered to its original damages ruling even after it was vacated for reconsideration in light of *Morales*. *See* 113 S. Ct. 32 (1992); 626 N.E.2d 205 (Ill. 1993).

APPENDIX

APPENDIX

[Filed Jun. 30, 1994]

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S034603

Ct. App. A059253

Super. Ct. No. 939359

JANET C. MANGINI,
Plaintiff and Appellant,

v.

R. J. REYNOLDS TOBACCO COMPANY, *et al.*,
Defendants and Respondents.

This lawsuit challenges an advertising campaign for Camel cigarettes featuring a cartoon character called Old Joe Camel. The campaign, it is claimed, improperly targets minors, and seeks to make cigarette smokers of them. The issue before us is whether the action is preempted by federal law. Its resolution requires us to interpret and apply the recent decision of *Cipollone* v. *Liggett Group, Inc.* (1992) 505 U.S. —— [112 S.Ct. 2608], which itself interpreted the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.).

We conclude that the action, as defined and limited by the Court of Appeal, is not preempted, and affirm the judgment of the Court of Appeal.

I. PROCEDURAL HISTORY

Plaintiff Mangini sued R. J. Reynolds Tobacco Company and others (hereafter collectively Reynolds) for injunctive relief, asserting two causes of action, one for "Unlawful, Unfair Business Practices," and one for "Unjust Enrichment and Imposition of Constructive Trust."

The complaint alleges, among other things, the following: About 75 percent of all adult smokers become addicted to tobacco before their 18th birthdays. Tobacco advertising causes children to become addicted. Since 1988, Reynolds has used a cartoon character called Old Joe Camel in its advertising campaign in order to attract teenage smokers. It has disseminated products such as matchbooks, store exit signs, scrip, mugs, and soft drink can holders advertising Camel cigarettes. The advertising has been effective in targeting adolescents. As a result of the campaign, the number of teenage smokers who choose Camel cigarettes has risen from 0.5 percent in 1988 to between 25 and 33 percent in 1992. Teenage smokers account for about $476 million of Camel sales in 1992 as compared with $6 million in 1988. " 'Old Joe, that hip cartoon camel used to advertise Camel cigarettes,' " the complaint alleges, " 'is now as familiar to young children as Mickey Mouse, and apparently is enticing thousands of teens to smoke that brand,' " and has caused Camel's popularity with teenagers to " 'surge[] 66-fold.' "

The first cause of action alleges that defendants "caused the advertisements of Camel cigarettes without any warning that cigarettes pose a health hazard" in violation of the Federal Cigarette Labeling and Advertising Act, and that this constitutes an unlawful and unfair business practice under Business and Professions Code section 17200 et seq. The second cause of action alleges that defendants are being unjustly enriched by the advertising campaign.

Six months after the complaint was filed, the United States Supreme Court decided *Cipollone* v. *Liggett Group, Inc., supra,* 505 U.S. —— [112 S.Ct. 2608]. Two weeks thereafter, Reynolds moved for summary judgment, contending that the action was preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq., as interpreted in that decision. The trial court agreed, and granted the motion. Plaintiff appealed.

The Court of Appeal reversed. It found that the two causes of action pleaded in the complaint were indeed preempted by federal law, which plaintiff does not now challenge, but it concluded that plaintiff should have been granted leave to amend the complaint. On appeal, plaintiff argued two additional theories of unfair business practice based upon facts already alleged in the complaint. The Court of Appeal found that one of the theories was preempted, a finding also not now challenged. The other theory, the one at issue here, "is that the Old Joe Camel advertising campaign targets minors for the purpose of inducing and increasing their illegal purchases of cigarettes."

Preliminarily, the court found the targeting minors theory to be cognizable under Business and Professions Code section 17200. "California's statutory law of unfair competition (Bus. & Prof. Code, § 17200 et seq.) authorizes actions for injunctive relief (Bus. & Prof. Code, § 17203) by certain state and local officers and persons acting for the interests of themselves or the general public (Bus. & Prof. Code § 17204). Unfair competition includes 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . .' (Bus. & Prof. Code § 17200.)" The court found that cigarette advertising targeting minors was "unfair" within the meaning of this statute.

It stated, "the targeting of minors in cigarette advertising offends public policy as established by statute. In California, it is unlawful to sell or furnish cigarettes to

persons under the age of 18 years, and it is unlawful for minors to purchase or receive cigarettes. (Pen. Code, § 307, subds. (a), (b).) This reflects a statutory policy of protecting minors from addiction to cigarettes. In an analogous context—a statutory proscription against nonsale public distribution of smokeless tobacco and cigarettes (Health & Saf. Code § 25967)—the Legislature has declared its intent that 'keeping children from beginning to use tobacco products in any form . . . shall be among the highest priorities in disease prevention for the State of California.' (Health & Saf. Code, § 25967, subd. (a)(11).) Cigarette advertising directed to minors contravenes the statutory policy of keeping children from starting on the road to tobacco addiction."

In addition, the court noted that "the targeting of minors is oppressive and unscrupulous, in that it exploits minors by luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking despite its health risks." It also found that "a persuasive argument can be made that the targeting of minors causes substantial physical injury to them. In the statutory proscription against nonsale public distribution of smokeless tobacco and cigarettes, the Legislature has found and declared the following: 'Tobacco product advertising and promotion are an important cause of tobacco use among children.' (Health & Saf. Code, § 25967, subd. (a)(9).) 'The earlier a child begins to use tobacco products, the more likely it is that the child will be unable to quit.' (Health & Saf. Code, § 25967, subd. (a)(5).) 'Smoking is the single most important source of preventable disease and premature death in California.' (Health & Saf. Code, § 25967, subd. (a)(1).) Mangini's complaint alleges that teenage smokers accounted for $476 million of Camel cigarette sales in 1992 as compared with $6 million in 1988 at the onset of the Old Joe Camel advertisements, implicitly suggesting such advertisements have harmed a great many teenagers by

luring them into extended use of and addiction to tobacco products."

The court went on to find that this cause of action was not preempted by the Federal Cigarette Labeling and Advertising Act. Finally, it held that although this theory was imperfectly pleaded in the complaint, the motion for summary judgment was equivalent to a motion for judgment on the pleadings, and the theory was supported by the factual allegations; therefore, the trial court should have granted leave to amend the complaint to allege this cause of action. The court thus reversed the judgment and remanded the cause "with directions to the superior court to give Mangini an opportunity to amend her complaint."

Reynolds petitioned for review, contending that the cause of action is preempted by federal law, and that the Court of Appeal erred procedurally in finding that plaintiff should have been granted leave to amend the complaint. Neither in the Court of Appeal nor in the petition for review did Reynolds challenge the holding that the targeting minors theory states a valid cause of action under state law. We granted review limited to the merits of the preemption issue.

II. DISCUSSION

A. Judicial Notice

The parties have filed eight separate requests for judicial notice, five by Reynolds, three by plaintiff. We grant some of the requests and deny the rest.

Although a court may judicially notice a variety of matters (Evid. Code, §§ 450 et seq.), only *relevant* material may be noticed. "But judicial notice, since it is a substitute for proof [citation], is always confined to those matters which are relevant to the issue at hand." (*Gbur* v. *Cohen* (1979) 93 Cal.App.3d 296, 301.) "While Evidence Code, section 451, provides in mandatory terms that certain matters designated therein must be

judicially noticed, the provisions contained therein are subject to the qualification that the matter to be judicially noticed must be relevant (Evid. Code, §§ 350, 450)," as well as "qualified by Evidence Code, section 352 . . . ." (*Mozetti* v. *City of Brisbane* (1977) 67 Cal.App.3d 565, 578; see also *Del Mar Terrace Conservancy, Inc.* v. *City Council* (1992) 10 Cal.App.4th 712, 744; *ITT Telecom Products Corp.* v. *Dooley* (1989) 214 Cal.App. 3d 307, 313, fn. 4; 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 47.1, p. 1749 ["Matters otherwise subject to judical notice must be relevant to an issue in the action."].) We therefore "decline" to judicially notice material that "has no bearing on the limited legal question at hand." (*People* v. *Stoll* (1989) 49 Cal.3d 1136, 1144, fn. 5.)

Plaintiff asks us to judicially notice a 1994 Report of the United States Surgeon General entitled "Preventing Tobacco use among young People," and a 1994 Report to the California Department of Health Services entitled "Tobacco Use in California." Both are irrelevant to the preemption question here, which interprets a 1969 federal statute. Moreover, to the extent plaintiff asks us to notice the truth of matters asserted in those documents, and not merely their existence, Reynolds has stated a valid objection. While courts may notice official acts and public records, "we do not take judicial notice of the truth of all matters stated therein." (*Love* v. *Wolf* (1964) 226 Cal.App.2d 378, 403; accord, *People* v. *Long* (1970) 7 Cal.App.3d 586, 591.) "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom." (*Cruz* v. *County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) We therefore deny plaintiff's first two requests for judicial notice.

Concurrently with two of its briefs, Reynolds asked us to notice materials relating to legislative history of the statute at issue. Although a simple citation to some of the readily available published material, such as excerpts from the United States Code Congressional and Administrative News, would have sufficed, we grant those requests, consisting of the first three items of Reynolds's original request, and the second item of its first supplemental request. (*Post* v. *Prati* (1979) 90 Cal.App.3d 626, 634; Evid. Code, § 452, subd. (c).)

Reynolds also requests notice of a 1992 letter from a number of state attorneys general to a United States Senator urging repeal of 15 United States Code section 1334 (b), and a newspaper account of that letter. A letter by persons seeking repeal of a statute, written long after its enactment, is irrelevant to the interpretation of that statute. Moreover, the existence of the newspaper article is irrelevant, and the truth of its contents is not judicially noticeable. We therefore deny those judicial notice requests, consisting of the fourth item of Reynolds's original request, and the first item of its first supplemental request.

Reynolds further asks us to notice an excerpt from the same Report of the United States Surgeon General that plaintiff asks us to notice, legislative history materials regarding a 1990 bill introduced in the California Legislature, and a complaint recently filed in a different action in Washington State. Those items, too, are irrelevant to the limited issue here. The requests, consisting of the fifth through eleventh items of Reynolds's original request, and the first item of Reynolds's second supplemental request, are denied.

After briefing was concluded, a few weeks before oral argument, Reynolds asked us to notice a federal court decision that was not cited in the briefs. That decision aids Reynolds very little, although it is arguably relevant. Relevant federal decisional law is generally subject to judicial notice. (Evid. Code, § 451, subd. (a).) How-

ever, Reynolds could have, and should have, cited the decision in the briefs, as it cited other federal decisions. Requests for judicial notice should not be used to "circumvent[]" appellate rules and procedures, including the normal briefing process. (*People* v. *Webster* (1991) 54 Cal.3d 411, 428, fn. 4, [judicial notice may not be used to circumvent the prohibition against citing unpublished opinions].) Asking that authority be judicially noticed instead of citing and discussing it in a brief gives the parties no orderly opportunity to argue the relevance of that authority or to distinguish it. The request, consisting of the second item of Reynolds's second supplemental request, is denied on that basis.

Two days before oral argument, Reynolds asked us to notice a newspaper article regarding a reported action by the Federal Trade Commission. The existence of the article is irrelevant, and the truth of its contents is not judicially noticeable. Reynolds's third supplemental request is therefore denied.

On the day of oral argument, both sides asked us to notice documents related to an action of the Federal Trade Commission. The commission "closed" an investigation into the "Joe Camel" advertising campaign, but stated that its action "is not to be construed as a determination that a violation may not have occurred. . . ." This action is irrelevant to the interpretation of the preemption statute; these final requests are therefore denied.

B. Preemption

The only cause of action for unfair business practice that survived Court of Appeal scrutiny, and thus the only one before us, is that "the Old Joe Camel advertising campaign targets minors for the purpose of inducing and increasing their illegal purchases of cigarettes." It is unlawful in California to sell or furnish cigarettes to minors, and for minors to buy them. (Pen. Code. § 308, subds. (a), (b).) The narrow issue before us is thus whether,

notwithstanding this prohibition against *sale,* attempts in California to regulate or prohibit *advertisement* of cigarettes to minors are preempted by federal law. We find they are not, although for somewhat different reasons than those stated by the Court of Appeal.

Reynolds relies on the Federal Cigarette Labeling and Advertising Act, enacted in 1965 (15 U.S.C. § 1331 et seq.), which contains an express preemption provision. As amended by the Public Health Cigarette Smoking Act of 1969 (hereafter sometimes the 1969 Act), 15 U.S.C. section 1334(b) (hereafter section 1334(b)) now provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

The United States Supreme Court interpreted the scope of section 1334(b) in *Cipollone* v. *Liggett Group, Inc., supra,* 505 U.S. —— [112 S.Ct. 2608] (*Cipollone*). There, plaintiff sued three cigarette manufacturers for common law damages resulting from the death of Rose Cipollone from lung cancer. Several theories of liability were alleged, including failure to warn of the health consequences of smoking, breach of express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts. The defendants contended the action was preempted. The high court analyzed the issue under both the preemption clause of the 1965 legislation and the current version of section 1334(b), only the latter of which is relevant to this case.

The high court first stated the applicable general principles.[1] The " ' "purpose of Congress is the ultimate touch-

[1] *Cipollone, supra,* 505 U.S. —— [112 S.Ct. 2608], was decided by a fragmented court. The lead opinion by Justice Stevens commanded majority support as to parts I through IV, but was a plurality opinion stating the views of only four Justices as to parts V and VI. Justices Blackmun and Scalia wrote separate concur-

stone" ' of pre-emption analysis." (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2617].) Because Congress enacted an express preemption provision, it implied that matters beyond the reach of that provision are not pre-empted. Hence, a cause is preempted by the Federal Cigarette Labeling and Advertising Act only if it is covered by the express language of section 1334(b). (*Id.* at p. — [112 S.Ct. at p. 2618].) Moreover, "the presumption against the pre-emption of state police power regulations" makes appropriate a "narrow reading" of section 1334(b). (*Ibid.*)

After the court stated the general principles and applied them to the 1965 act, the plurality turned to the current statute, the one at issue here. (*Cipollone, supra,* 505 U.S. at pp. — - - — [112 S.Ct. at pp. 2619-2625].) The plurality first rejected the plaintiff's argument that section 1334(b) applied only to "positive enactments" such as state statutes, injunctions or executive pronouncements, and not to common law damages actions. (*Id.* at p. — [112 S. Ct. at p. 2620].) It found "no distinction between positive enactments and common law. . . ." (*Ibid.*)

But, the plurality said, this "does not mean that [section 1334(b)] pre-empts all common law claims." (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2621].) The court instead "must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of [section 1334(b)] and we must look

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ring and dissenting opinions. Justice Blackmun, speaking for himself and two other Justices, concurred in parts I through IV, but would have found no part of the action preempted. Justice Scalia, speaking for himself and one other Justice, would have found the entire action preempted under the current statute. Discussion of the parts of Justice Stevens's opinion that received majority support will refer to the "court." Discussion of the parts of Justice Stevens's opinion not supported by a majority will refer to the "plurality" opinion. References to the separate opinions will indicate the author. The opinions cite section 1334(b) as section 5(b), referring to the act of which it was a part.

to each of petitioner's common law claims to determine whether it is in fact pre-empted. [Fn. omitted.] The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." (*Ibid.*)

Applying this test to the specific claims, the plurality reached several conclusions. The claim for "failure to warn" was preempted to the extent it relied on a state law requirement with respect to advertising or promotion. (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at pp. 2621-2622].) The claim for "breach of express warranty" was not preempted because the predicate duty is not imposed under state law but rather by the warrantor. (*Id.* at p. — [112 S.Ct. at pp. 2622-2623].) The claim for "fraudulent misrepresentation" based on a theory that the advertising neutralized the effect of the federally mandated warning labels was preempted because it was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking," which is "merely the converse of a state law *requirement* that warnings be included in advertising and promotional materials," and is therefore "inextricably related" to the preempted failure to warn theory. (*Id.* at p. — [112 S.Ct. at p. 2623], italics in original.) Finally, as will be discussed in greater detail below, the "fraudulent misrepresentation" and related conspiracy claim based on a theory of false representation and concealment of material facts were not preempted. (*Id.* at p. — [112 S.Ct. at pp. 2623-2624].)

Justice Blackmun was of the view that no common law damages claims are preempted. (*Cipollone, supra,* 505 U.S. at pp. — - - — [112 S.Ct. at pp. 2625-2632] (conc. &

dis. opn. of Blackmun, J.).) Justice Scalia was of the view that the entire action was preempted. (*Id.* at pp. — - — [112 S.Ct. at pp. 2632-2638] (conc. & dis. opn of Scalia, J.).)

Reynolds argues that because its cigarettes are labeled in conformity with federal law, California may not impose any regulation with respect to advertising the cigarettes if the regulation is "based on smoking and health." The prohibition against selling cigarettes to minors is based on underlying health concerns, the argument continues, and therefore the state may not impose any requirement or prohibition with respect to advertisements of cigarettes that target minors.

Reynolds contends, in effect, that if it had used billboards depicting Old Joe Camel stating in huge block letters, "Kids, be the first in your fourth grade class cool enough to smoke Camels"; or, to use the example of the Court of Appeal, "if Reynolds had . . . presented Teenage Mutant Ninja Turtles on children's lunch boxes to promote cigarette smoking," California could do nothing about it, for any attempt to do so would be a requirement or prohibition "based on smoking and health." Only the federal government, Reynolds claims, can prevent advertisements that urge minors to smoke, no matter how blatantly. As we will indicate, Reynolds is incorrect. California may, consistently with section 1334(b), shield minors from cigarette advertising inducing them to smoke.

In conducting the "central inquiry" established in *Cipollone,* we find that this action clearly seeks to impose a requirement or, more specifically, a prohibition under state law with respect to advertising or promoting cigarettes. It seeks to prohibit advertising of cigarettes targeting minors based upon state statutes prohibiting unfair business practices and selling or furnishing cigarettes to minors. The entire issue thus comes down to this: Is the predicate legal duty "based on smoking and health"

as that phrase was construed in *Cipollone*? We answer that it is not.

The *Cipollone* plurality's discussion of the fraudulent misrepresentation and conspiracy claims is dispositive. (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at pp. 2623-2624].) The claims in *Cipollone* were based on allegations that the defendants "misrepresent[ed] or conceal[ed] material facts concerning the health hazards of smoking." (*Id.* at p. — [112 S.Ct. at p. 2624].) Although concerns about smoking and health ultimately underlie such allegations, the plurality noted that the "predicate of this claim is a state law duty not to make false statements of material fact or to conceal such facts." (*Id.* at p. — [112 S.Ct. at p. 2623].) Such claims are therefore not preempted because they "are not predicated on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." (*Id.* at p. — [112 S.Ct. at p. 2624].)

The plurality found that "Congress intended the phrase 'relating to smoking and health' [language from the original preemption provision but which the court found was "essentially unchanged by the 1969 Act"] to be construed narrowly, so as not to proscribe the regulation of deceptive advertising." (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2624].) Moreover, the plurality found, "this reading of 'based on smoking and health' is wholly consistent with the purposes of the 1969 Act. State law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards. Unlike state law obligations concerning the warning necessary to render a product 'reasonably safe,' state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly, [plaintiff's] claim based on allegedly fraudulent statements made in

[defendants'] advertisements are not pre-empted by § 5(b) of the 1969 Act [§ 1331(b)]." (*Ibid.*)

This discussion applies to the instant cause of action. As noted previously, it is unlawful in California to sell cigarettes to minors or for minors to buy them. Advertising aimed at such unlawful conduct would assist vendors in violating the law. The predicate duty is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law. In *Cipollone,* the predicate duty—not to deceive—was not "based on smoking and health"; this one is similarly not. "Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to" unfairly assist or advertise illegal conduct. (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2624].) This action is therefore not preempted.

Contrary to Reynolds's argument, this conclusion is wholly consistent with the purposes of the 1969 Act. Congress stated its policy to " 'establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health,' " in part to avoid " 'diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.' " (15 U.S.C. § 1331 as quoted in *Cipollone, supra,* 505 U.S. at p. —, fn. 5 [112 S.Ct. at pp. 2614-2615, fn. 5].) State law prohibitions against advertisements targeting minors do not require Reynolds to adopt any particular label or advertisement "with respect to any relationship between smoking and health"; rather, they forbid *any* advertisements soliciting unlawful purchases by minors. The prohibitions do not create " 'diverse, nonuniform, and confusing' standards. Unlike state law obligations concerning the warning necessary to render a product 'reasonably safe,' state law proscriptions" against advertisements targeting minors "rely only on a

single, uniform standard": do not target minors. (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2624].)

The Court of Appeal cited various statutes stressing the health consequences of smoking. Reynolds argues this proves that health concerns underlie this action, and it is therefore preempted. Although the Legislature has certainly spoken about the dangers of smoking, we do not rely on those provisions in finding no preemption, but on Penal Code section 308, which prohibits the sale of cigarettes to minors. The original version of that statute, which prohibited selling to anyone "under the age of sixteen years, any tobacco, or preparation of tobacco," was enacted over a century ago. (Stats. 1981, ch. 70, § 1, p. 64.) This was long before current health concerns, and specifically the health concerns that fuel this lawsuit, arose. The statute is part of a chapter of the Penal Code containing offenses "against good morals." (Pen. Code, pt. 1, tit. 9, ch. 7.) Several of these offenses involve minors. Pen. Code, §§ 307 [illegal to sell specified food items containing alcohol to those under the age of 21 years], 309 [illegal to admit a minor to a house of prostitution], 310 [illegal for a minor under the age of 16 years to attend a prizefight or cockfight].) This shows that the state's protective role, and not primarily health concerns, motivated the prohibition against selling cigarettes to minors.

Reynolds argues that health concerns are ultimately at issue here; therefore, the predicate duty is not based on unfair business practices, but on smoking and health. This is essentially the preemption argument rejected in *Cipollone.*

Responding to the analogous argument by Justice Scalia that "we should construe fraudulent misrepresentation claims *not* as based on a general duty not to deceive but rather as 'based on smoking and health,' " the *Cipollone* plurality noted that this position "has some conceptual attraction." (*Cipollone, supra,* 505 U.S. at p. — fn. 27

[112 S.Ct. at p. 2624, fn. 27], italics in original.) "However," it responded, "our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose." (*Ibid.*) To accept this argument "would conflict both with the background presumption against preemption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States." (*Ibid.*) The same is true with Reynolds's argument.

As in *Cipollone,* evidence of congressional intent bolsters this conclusion. Indeed, some of the evidence the plurality cited is closely on point: "The Senate Report [regarding the 1969 Act] emphasized that the 'preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health.* It would in no way affect the power of any State . . . with respect to the taxation or **the sale of cigarettes to minors,** or the prohibition of smoking in public buildings, or *similar police regulations.*' S. Rep. No. 91-566, p. 12. . . ." (*Cipollone, supra,* 505 U.S. at p. —, fn. 26 [112 S.Ct. at p. 2624, fn. 26], italics in *Cipollone,* bold print added.) If Congress did not intend to affect the power of the state "with respect to" the sale of cigarettes to minors, surely section 1334(b) does not preempt attempts to prohibit the advertising of cigarettes directed at minors. Reynolds responds to this argument by quoting the next sentence of the same report: "It [preemption] is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." (1970 U.S. Code Cong. & Admin. News, at p. 2663, reproducing Sen. Rep. No. 91-566, 2d Sess.) This sentence, not quoted in *Cipollone,* does indeed exist, but it does not support Reynolds. Noting that preemption is "limited" to a certain subject does not aid in determining what, within that subject, is actually preempted.

The same Senate Report cited in *Cipollone* states that at hearings held before the Consumer Subcommittee of the Senate Committee on Commerce, and attended by the

full committee, the "cigarette manufacturers . . . stated to the committee that with respect to all other advertising, they would *avoid advertising directed to young persons,* and would continue to abstain from advertising in school and college publications, would continue not to distribute sample cigarettes or engage in promotional activities on school and college campuses, would continue not to use testimonials from athletes or other celebrities who might have special appeal to young people . . . ." (1970 U.S. Code Cong. & Admin. News, at p. 2660, reproducing Sen. Rep. No. 91-566, *supra,* italics added.) The report noted: "The committee cannot overstate its strong desire that the cigarette industry not only honor its statement *carefully to limit print advertising so as not to appeal to youth,* but that it will also exercise restraint in the overall use of print advertising and other forms of promotion." (*Id.* at p. 2662, italics added.) Reynolds argues this indicates Congress intended to preempt the field of advertising to minors, and to rely solely on voluntary self-regulation. It reads too much into too little. This shard of legislative history is not dispositive either way, but it certainly does not prove Reynolds's position.

More recently, Congress enacted legislation allowing certain monetary grants to states, but "only if the State involved has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," and "will enforce" that law. (42 U.S.C. § 300x-26(a), (b).) A state receiving such a grant must agree to develop "strategies to discourage the use of . . . tobacco products by individuals to whom it is unlawful to sell or distribute such . . . products." (42 U.S.C. § 300x-22(b)(2)(B).)

We thus observe that cigarette manufacturers themselves promised to eschew advertisements targeting the young; Congress intended to allow and more recently has even encouraged states to enact and *enforce* laws pro-

hibiting the sale of cigarettes to minors; and Congress has required states, as a condition of receiving certain grants, to "discourage" the use of tobacco by those to whom it is unlawful to sell or distribute it, i.e., to minors. No appropriately "narrow" interpretation of section 1334(b) could conclude, in the face of this evidence, that Congress nevertheless left states powerless to prohibit advertisements that target minors and, by targeting minors, that *encourage*, those illegal sales. This evidence of congressional purpose, the " ' "ultimate touchstone" ' of preemption analysis" (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2617]), shows no intent to preempt the cause of action at issue here.

Moreover, even if congressional intent were less than clear, Reynolds still would not prevail. Given the presumption against preemption, courts assume " 'that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " (*Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2617] [speaking for the majority at this point], quoting *Rice* v. *Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.) Here, there is certainly no clear and manifest purpose of Congress to preempt this cause of action. We must therefore assume that the historic police powers of the state have not been superseded.

Reynolds cites certain statements by congressional opponents of the 1969 Act as supporting its position. We doubt that statements criticizing the bill help to discern the intent of the majority. (See *California Teachers Assn.* v. *San Diego Community College Dist.* (1981) 28 Cal. 3d 692, 699-700 [statements by individual legislators who voted in *favor* of the statute are generally not considered].) The statements do not aid Reynolds. Several dissenting Senators expressed the fear that "if the [Federal Trade Commission] is barred by statute from requiring a warning in advertising, the public will have no meaning-

ful defense, even against a massive onslaught of print advertising . . . designed to make cigarette smoking appealing to young people." (1970 U.S. Code Cong. & Admin. News, at p. 2667, reproducing Sen. Rep. No. 91-566, *supra.*) Attempting to transform rhetoric into self-fulfilling prophesy, Reynolds claims the dissenters prove its case. We disagree. Opponents' fears hardly prove what the majority wanted or intended. The majority may merely have disagreed with the dissenters' bleak assessment of the impact of the bill. Other dissenting statements are similarly unhelpful to Reynolds.

Reynolds argues further that because this action seeks injunctive relief rather than common law damages, it is preempted. It seems to argue first that *any* injunctive relief, of whatever nature, is preempted, and claims the *Cipollone* plaintiff conceded that section 1334(b) was intended " 'to trump "state statute[s], injunction[s], or executive pronouncement[s]." ' " (Quoting *Cipollone, supra,* 505 U.S. at p. — [112 S.Ct. at p. 2620].) This overstates the plaintiff's argument in *Cipollone,* which was merely that the section applied "only" to positive enactments, a claim the plurality rejected, not that *all* such enactments were preempted. (See *ibid.*) The *Cipollone* plurality made clear it found "no distinction between positive enactments and common law . . . ." (*Ibid.*)

Reynolds also posits that because both Justices Blackmun and Scalia, who together spoke for five justices, criticized the plurality's analysis of what claims were and were not preempted, and because even Justice Blackmun would find at least some positive enactments covered by section 1334(b), the two separate opinions form a majority finding injunctive relief preempted. But the dissenters criticized the plurality from opposite directions. Justice Blackmun argued that the plurality's analysis resulted in too much preemption; Justice Scalia argued it resulted in too little. Nothing in Justice Blackmun's opinion suggests that he would find more preemption regard-

ing injunctions than the majority, and certainly nothing suggesting he would leave the states powerless to combat advertising targeting minors. Indeed, Justice Blackmun argued that the 1965 statute "can bear only one meaning: that States are prohibited merely from 'mandating particular cautionary statements . . . in cigarette advertisements' "; and that "there is no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision when it amended the statute in 1969." (*Cipollone, supra,* 505 U.S. at pp. ——, —— [112 S.Ct. at pp. 2626, 2629] (conc. & dis. opn. of Blackmun, J.).)

Reynolds finally argues that some forms of injunctive relief at least would be preempted, such as a requirement of "additional health warning labels on advertisements." This may be the case, but the sole issue before us is whether the basis for the injunctive relief sought is preempted. It is not. In sum, we hold that the targeting minors cause of action is not preempted, not that any particular form of injunctive relief would be proper. Any challenge to a particular remedy, should plaintiff prevail on the merits, is premature.

III. CONCLUSION

As early as 1891, the Legislature cared deeply enough about smoking and minors that it prohibited the sale of cigarettes to them, just as it earlier had banned minors from houses of prostitution and would later ban them from prizefights. For over a century, with watchful eye, in its role as *parens patriae,* it has maintained a paternalistic vigilance over this vulnerable segment of our society. It is now asserted that plaintiff's efforts to tread upon Tobacco Road is blocked by the nicotine wall of congressional preemption. The federal statute does not support such a view. Congress left the states free to exercise their police power to protect minors from advertising that encourages them to violate the law. Plaintiff may proceed under the aegis.

The judgment of the Court of Appeal is affirmed.

ARABIAN, J.

WE CONCUR:

LUCAS, C.J.

MOSK, J.

KENNARD, J.

BAXTER, J.

GEORGE, J.

WERDEGAR, J.

[Filed Jul. 14, 1993]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

A059253
(San Francisco Super. Ct. No. 939359)

JANET C. MANGINI,
Plaintiff and Appellant,

v.

R.J. REYNOLDS TOBACCO COMPANY *et al.*,
Defendants and Respondents.

I. INTRODUCTION

In this case we hold that federal law does not preempt a cause of action alleging that specified cigarette advertising is an unfair business practice under California law.

Janet C. Mangini appeals from a summary judgment in her action challenging the use of a cartoon character by R.J. Reynolds Tobacco Company in an advertising campaign for Camel cigarettes. Mangini contends the advertising constitutes an unfair business practice (Bus. & Prof. Code, § 17200 et seq.) because it targets minors for the purpose of inducing and increasing their illegal purchases of cigarettes. We hold such a claim is not preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.).

II. BACKGROUND

A. *The Complaint*

Mangini sued R.J. Reynolds Tobacco Company, its parent company (which was never served), and two ad-

vertising agencies for injunctive relief. The complaint asserts two causes of action, styled as "Unlawful, Unfair Business Practices" and "Unjust Enrichment And Imposition of Constructive Trust."

The complaint alleges the following facts: About 75 percent of all adult smokers become addicted to tobacco before their 18th birthday, and tobacco advertising is causally related to teenage addiction. Since 1988, Reynolds has been using a cartoon camel character called Old Joe Camel in the advertising of Camel cigarettes in order to attract teenage smokers. As a result of the Old Joe Camel advertising campaign, the number of teenage smokers who choose Camel cigarettes has risen from 0.5 percent in 1988 to between 25 and 33 percent in 1992, with teenage smokers accounting for $476 million of Camel sales in 1992 as compared with $6 million in 1988. Reynolds has disseminated products such as matchbooks, exit signs, scrip, mugs and soft drink can holders which advertise Camel cigarettes but do not contain warnings that cigarettes pose health hazards.

The first cause of action, for unlawful and unfair business practices, alleges that the defendants have "caused the advertisements of Camel cigarettes without any warning that cigarettes pose a health hazard," and that this conduct violates the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.) and constitutes an unlawful and unfair business practice under Business and Professions Code section 17200 et seq. The second cause of action, for unjust enrichment, adds that the defendants have been and will be unjustly enriched through the Old Joe Camel advertising campaign.

The complaint seeks an order enjoining the challenged advertising, imposing a constructive trust on the defendants' "ill-gotten gains," and requiring the defendants to undertake "corrective" advertising and print media campaigns warning consumers of the health hazards of smok-

ing in order to negate the effect of the Old Joe Camel advertisements.

B. *The Preemption Context*

Six months after this complaint was filed, the United States Supreme Court decided *Cipollone* v. *Liggett Group, Inc.* (1992) 505 U.S. —— [120 L.Ed.2d 407]. That case, which is fundamental to resolution of the present appeal, addressed the scope of preemption of state court common law damages claimed by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.).

The Federal Cigarette Labeling and Advertising Act was enacted in 1965. It required health warnings on cigarette packages but not in cigarette advertising. It also contained a preemption clause which provided, in pertinent part, "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (Pub.L. No. 89-92, 79 Stat. 282-283; see *Cipollone* v. *Liggett Group, Inc., supra*, 505 U.S. at p. —— [120 L.Ed.2d at p. 421].)

The 1965 Act was amended in 1969 by the Public Health Cigarette Smoking Act. The 1969 Act strengthened the cigarette package warning label, banned certain cigarette advertising, and modified the preemption provision quoted above. Pub.L. No. 91-222, 84 Stat. 87; see *Cipollone* v. *Liggett Group, Inc., supra*, 505 U.S. at p. —— [120 L.Ed.2d at p. 422.) That provision now reads, "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." (15 U.S.C. § 1334(b).)

The *Cipollone* litigation was a state court common law damages action implicating three cigarette manufacturers in the death of Rose Cipollone from lung cancer. The action was based on multiple theories, including the fol-

lowing: failure to warn of the health consequences of smoking; breach of an express warranty that cigarettes did not present significant health consequences; fraudulent misrepresentation by neutralization of federally mandated warning labels through advertising; and fraudulent misrepresentation through false statements and concealment of material facts concerning the health hazards of smoking. (*Cipollone* v. *Liggett Group, Inc., supra*, 505 U.S. at pp. —— [120 L.Ed.2d at pp. 418-419, 427-431].)

The issue before the United States Supreme Court was whether these common law claims were preempted by the above-quoted provisions of the 1965 Act or the 1969 Act. With regard to the 1965 Act, the court held that its preemption provision (now superseded by the 1969 Act) did not encompass common law claims but extended only to "positive enactments by legislatures or administrative agencies that mandate particular warning labels." (505 U.S. at p. —— [120 L.Ed.2d at p. 424].) With regard to the 1969 Act, the court held that its preemption provision (the one currently in force) preempts common law damages actions as well as positive enactments. (*Id.* at p. —— [120 L.Ed.2d at pp. 426-427].) However, the scope of such preemption is limited; it does not encompass all common law claims. Rather, the language of the 1969 preemption clause defines its scope, and each claim must be examined individually to determine whether it is preempted. "The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." (*Id.* at p. —— [120 L.Ed.2d at p. 42',], quoting 15 U.S.C. § 1334(b).)

Applying this standard to the allegations in the complaint, *Cipollone* reached the following conclusions: Claims for failure to warn of the health consequences of smoking were preempted to the extent they relied on a

requirement or prohibition with respect to advertising or promotion. 505 U.S. at p. —— [120 L.Ed.2d at p. 428].) The claim for breach of express warranty was not preempted because the predicate legal duty was not imposed under state law but instead arose from the manufacturers' statements in their advertisements. (*Id.* at p. —— [120 L.Ed.2d at pp. 428-429].) The claim for fraudulent misrepresentation by neutralization of federally mandated warning labels through advertising was preempted because it was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking," which was "merely the converse of a state law *requirement* that warnings be included in advertising and promotional materials," and was "inextricably related" to the preempted failure to warn theory. (*Id.* at p. —— [120 L.Ed.2d at pp. 429-430], original italics.) The final claim, for fraudulent misrepresentation through false statements and concealment of material facts concerning the health hazards of smoking, was not preempted because it was "not predicated on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." (*Id.* at p. —— [120 L.Ed.2d at p. 430], quoting 15 U.S.C. § 1334(b).)

C. *The Judgment*

Two weeks after *Cipollone* was decided, Reynolds and the advertising agencies (hereafter collectively referred to as Reynolds) moved for summary judgment, asserting preemption by the Federal Cigarette Labeling and Advertising Act.

At the hearing on the motion, the court voiced its belief that under the 1969 Act as interpreted in *Cipollone*, Mangini's claims were preempted: "As far as I'm concerned, any state law claim . . . no matter how it is labeled, if the underpinning of it is advertising or promotion of cigarettes, you are dead in the water under this

opinion." Mangini's counsel argued that "if the advertising is fraudulent, we can proceed under state law." The court replied, "I don't agree. . . . [¶] . . . [N]o matter what you label it, if it deals with advertising or promotion, it's preempted . . . ." The court rendered summary judgment for Reynolds on the ground of federal preemption.

III. DISCUSSION

On appeal, Mangini asserts the following two theories of unfair business practice under Business and Professions Code section 17200 et seq., which she contends are outside the scope of federal preemption: (1) the Old Joe Camel advertising campaign targets minors for the purpose of inducing and increasing their illegal purchases of cigarettes; and (2) the advertising glamourizes cigarette smoking to minors without disclosing the ill effects of smoking and the fact it is illegal for minors to purchase cigarettes in California. Mangini insists her complaint includes these theories, but she also contends that if it did not she should have been given a chance to amend the complaint to include them.

Reynolds responds that these are new legal theories which may not be raised for the first time on appeal, that Mangini did not properly request leave to amend the complaint, and that even if these theories are cognizable they are preempted by the Federal Cigarette Labeling and Advertising Act as interpreted in *Cipollone*.

A. *New Theories and Leave To Amend*

We begin with the obvious: these are indeed new legal theories intended to replace the existing theory of the complaint, which is preempted under *Cipollone*.

The theory of the first cause of action (unlawful and unfair business practice under Bus. & Prof. Code, § 17200 et seq.) and the second cause of action (unjust enrichment) is the same: Reynolds has disseminated products

advertising Camel cigarettes "without any warning that cigarettes pose a health hazard." This is a failure to warn theory of the sort found to have been preempted in *Cipollone*. Mangini does not contend otherwise.[1]

The complaint includes the factual allegation that Reynolds has been using Old Joe Camel to attract teenage smokers. Nowhere, however, does the complaint theorize that this is an "unlawful, unfair or fraudulent business practice" or constitutes "unfair, deceptive, untrue or misleading advertising" under Business and Professions Code section 17200. That legal theory appears for the first time on appeal, and the same is true for the "glamourizing without disclosure" theory.

Reynolds contends these new legal theories are not cognizable on appeal, for two reasons. First, they are not merely corrective of pleading defects but are completely new theories of liability, and on an appeal after summary judgment " 'possible theories not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal.' " (*Robinson* v. *Hewlett-Packard Corp.* (1986) 183 Cal.App.3d 1108, 1127, quoting *Johanson Transportation Service* v. *Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588.) Second, Mangini did not formally request or move for leave to amend the complaint to assert these new theories, but merely stated in a footnote to her opposition to summary judgment that "the hearing on this motion should be continued or stayed to allow amendment of the Complaint."

The flaw in Reynolds's position is that although Reynolds moved for summary judgment, the motion was in fact a test of the facial sufficiency of the complaint. Consequently, the motion was equivalent to a motion for

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[1] Because such preemption is undisputed, we need not address Reynolds's alternative claim that the dissemination of these products is unactionable because they are exempt from the labeling requirements of the Federal Cigarette Labeling and Advertising Act.

judgment on the pleadings, for which there are special rules on new theories and leave to amend.

The summary judgment procedure allows the use of evidence to look behind the pleadings and determine whether the claims or defenses pleaded are sham or without evidentiary support. In contrast, a demurrer or motion for judgment on the pleadings attacks the sufficiency of a pleading on its face. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial 3 (Rutter 1992) §§ 10:1-10:2, p. 10-1.)

A defense motion for summary judgment, however, necessarily includes a test of the complaint's facial sufficiency. If the motion is granted on that basis rather than the nonexistence of a triable fact issue, it is in legal effect a motion for judgment on the pleadings. (*Robinson* v. *Hewlett-Packard Corp., supra*, 183 Cal.App.3d at p. 1131; see also *Kirby* v. *Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067; *Heimadi* v. *AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 535-536.)

In such situations, where a summary judgment motion is equivalent to a motion for judgment on the pleadings, if "the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend." (*Kirby* v. *Albert D. Seeno Construction Co., supra*, 11 Cal.App. 4th at p. 1067; see also *Williams* v. *Braslow* (1986) 179 Cal.App.3d 762, 774 [ruling on motion for summary judgment "amounted to a judgment on the pleadings which should have afforded plaintiff a chance to amend"].) The standard is whether it is "reasonably possible" the complaint can be amended to cure the pleading defect. (*Kirby* v. *Albert D. Seeno Construction Co., supra*, 11 Cal.App.4th at p. 1069.)

The required opportunity to amend may be urged for the first time on appeal. By statute, upon the sustaining of a demurrer, a trial court's failure to afford leave to

amend may be asserted for the first time on appeal and may be reviewed for abuse of discretion, even absent any request below for leave to amend. (Code Civ. Proc., § 472c; *Aubry* v. *Tri-City Hospital Dist.* (1992) 2 Cal. 4th 962, 971.) The same rule applies on appeal from a judgment on the pleadings. (*MacIsaac* v. *Pozzo* (1945) 26 Cal.2d 809, 816; *Dobbins* v. *Hardister* (1966) 242 Cal.App.2d 787, 796.) In other words, on appeal after a pleading-stage disposition (whether by demurrer or judgment on the pleadings), a new theory of liability may be asserted for the first time, and "we search the facts to see if they make out a claim for relief under *any* theory." (*Smith* v. *Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630 original italics.) The same rule logically should apply where a summary judgment motion is in legal effect a motion for judgment on the pleadings.

Here, the claim of federal preemption asserted by Reynolds in its motion for summary judgment did not go behind the pleadings and was not an attempt to show that Mangini's complaint lacked evidentiary support. Rather, Reynolds attacked the complaint's facial sufficiency. The argument was that even if Mangini's factual allegations were true, her action was preempted by the Federal Cigarette Labeling and Advertising Act. Reynolds specifically asserted in a reply memorandum that "here, the issue [of preemption] turns on the application of a pure question of law to the allegations of the Complaint . . . . Indeed, for the purpose of the application of the preemption defense on summary judgment only, Defendants have assumed that the allegations of the Complaint are true." (Compare *Reed* v. *City and County of San Francisco* (1992) 10 Cal.App.4th 572 [federal preemption issue raised by demurrer].)

Thus, the summary judgment motion was in legal effect a motion for judgment on the pleadings, and the trial court should have given Mangini an opportunity to amend

the complaint if the alleged facts indicate Mangini has a good cause of action which is imperfectly pleaded. Mangini was not required to make a formal request or motion for leave to amend; it is inconsequential that she merely requested in a footnote a continuance or stay to allow an amendment. Mangini's new legal theories may be raised for the first time on appeal.

B. *Whether The Alleged Facts Indicate A Good Cause Of Action*

We must therefore decide whether the facts alleged in the complaint indicate Mangini has a good cause of action which is imperfectly pleaded—i.e., whether it is reasonably possible the complaint can be amended to cure the pleading defect. The answer depends on whether those facts support a legal theory under Business and Professions Code section 17200 et seq. as to which there is no preemption by the Federal Cigarette Labeling and Advertising Act. If so, we must conclude the trial court erred in failing to give Mangini an opportunity to amend the complaint.

Mangini presents two legal theories on appeal. One theory—that the Old Joe Camel advertisements glamourize cigarette smoking to minors without disclosing the ill effects of smoking and the fact it is illegal for minors to purchase cigarettes in California—is easily disposed of. This, like the original theory of the complaint, is a failure to warn theory. It is analogous to the preempted claim in *Cipollone* of fraudulent misrepresentation by neutralization of federally mandated warning labels through advertising. It is "predicted on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking," which is "merely the converse of a state law *requirement* that warnings be included in advertising and promotional materials." (505 U.S. at p ——— [120 L.Ed.2d at p. 429], original italics.) For this reason, the "glamourizing without disclosure" theory

is preempted by the Federal Cigarette Labeling and Advertising Act and is not a basis for giving Mangini an opportunity to amend the complaint.

Mangini's other legal theory is that the Old Joe Camel advertising campaign targets minors for the purpose of inducing and increasing their illegal purchases of cigarettes. This theory does not have a failure to warn element, and thus there is no preemption on that basis. The theory focuses on the bare fact of targeting minors. Preliminarily, we must consider whether, as Mangini urges, this theory is cognizable under Business and Professions Code section 17200.

1. Business and Professions Code section 17200

California's statutory law of unfair competition (Bus. & Prof. Code, § 17200 et seq.) authorizes actions for injunctive relief (Bus. & Prof. Code, § 17203) by certain state and local officers and persons acting for the interests of themselves or the general public (Bus. & Prof. Code, § 17204). Unfair competition includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." (Bus. & Prof. Code, § 17200.) In the present context, the question is whether the targeting of minors for Old Joe Camel advertisements constitutes "unfair, deceptive, untrue or misleading advertising" within the meaning of Business and Professions Code section 17200.

The bare fact of targeting minors, in and of itself, does not amount to deceptive, untrue or misleading advertising. The "targeting" theory focuses not on any affirmative deception in the content of the advertising—and the complaint alleges none—but simply on the purported exploitation of an inappropriate audience of minors. Thus, section 17200 is invoked only if the advertising is "unfair" within the meaning of the statute.

What is "unfair" advertising? There is no statutory definition. The general proscription in section 17200

against "unfair" business practices "establishes only a wide standard to guide courts of equity; . . . given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." (*Barquis* v. *Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112.) Thus, section 17200 casts an extremely broad net, with the proscription against unfair business practices intended by the Legislature "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." (*Id.* at p. 111.)

In determining more specifically what constitutes "unfair" advertising under section 17200, we may be guided by interpretations of similar provisions of federal law. (*O'Connor* v. *Superior Court* (1986) 177 Cal.App.3d 1013, 1017; *People* ex rel. *Mosk* v. *National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 772-773.) Such provisions appear in the Federal Trade Commission Act, which proscribes "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." (15 U.S.C. § 45 (a)(1).) Under the Federal Cigarette Labeling and Advertising Act, the FTC retains its authority under the Federal Trade Commission Act to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." (15 U.S.C. § 1336.)

The FTC, whose interpretation is entitled to great weight (*Fed. Tr. Comm'n* v. *Keppel & Bro.* (1934) 291 U.S. 304, 314), considers three factors in determining whether a business practice which is neither deceptive nor an antitrust violation is nevertheless unfair: (1) whether it offends public policy as established by statutes, the common law, or otherwise; (2) whether it is immoral, unethical, oppressive or unscrupulous; and (3) whether it causes substantial injury to consumers. (*FTC* v. *Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 244-245, fn. 5.)

Using these factors as our guideline, we conclude that the targeting of minors in cigarette advertising is "unfair" under section 17200.

First, the targeting of minors in cigarette advertising offends public policy as established by statute. In California, it is unlawful to sell or furnish cigarettes to persons under the age of 18 years, and it is unlawful for minors to purchase or receive cigarettes. (Pen. Code, § 308, subds. (a), (b).) This reflects a statutory policy of protecting minors from addiction to cigarettes. In an analogous context—a statutory proscription against nonsale public distribution of smokeless tobacco and cigarettes (Health & Saf. Code, § 25967)—the Legislature has declared its intent that "keeping children from beginning to use tobacco products in any form . . . shall be among the highest priorities in disease prevention for the State of California." (Health & Saf. Code, § 25967, subd. (a)(11).) Cigarette advertising directed to minors contravenes the statutory policy of keeping children from starting on the road to tobacco addiction.

Second, leaving aside the subjective questions of morals and ethics, the targeting of minors is oppressive and unscrupulous, in that it exploits minors by luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking despite its health risks.

Third, a persuasive argument can be made that the targeting of minors causes substantial physical injury to them. In the statutory proscription against nonsale public distribution of smokeless tobacco and cigarettes, the Legislature has found and declared the following: "Tobacco product advertising and promotion are an important cause of tobacco use among children." (Health & Saf. Code, § 25967, subd. (a)(9).) "The earlier a child begins to use tobacco products, the more likely it is that the child will be unable to quit." (Health & Saf. Code,

§ 25967, subd. (a)(5).) "Smoking is the single most important source of preventable disease and premature death in California." (Health & Saf. Code, § 25967, subd. (a)(1).) Mangini's complaint alleges that teenage smokers accounted for $476 million of Camel cigarette sales in 1992 as compared with $6 million in 1988 at the onset of the Old Joe Camel advertisements, implicitly suggesting such advertisements have harmed a great many teenagers by luring them into extended use of and addiction to tobacco products.

There is a closely analogous precedent for our conclusion that the targeting of minors in cigarette advertising constitutes unfair advertising, and hence unfair competition, under Business and Professions Code section 17200. In *Fed. Tr. Comm'n* v. *Keppel & Bro., supra,* 291 U.S. 304, the United States Supreme Court held that the marketing of candy to children through lottery methods constituted "unfair" competition under the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)).

In *Keppel,* a candy manufacturer marketed individual pieces of "penny" candy by lottery methods as an inducement to retail purchases. A few candies were wrapped with a concealed cent so that they would be obtained without cost; some candies had varying prices concealed within the wrapper, with the price to be ascertained only after selection of the candy; and a few candies had concealed centers of a special color which entitled the purchaser to a prize. The candies were marketed with "a display card, attractive to children," explaining the lottery schemes, for exhibition by the dealer selling the candy. (*Fed. Tr. Comm'n* v. *Keppel & Bro., supra,* 291 U.S. at p. 307.)

The FTC concluded that these marketing methods constituted unfair competition under the Federal Trade Commission Act because they encouraged gambling among children. (291 U.S. at pp. 307-308.) The United States Supreme Court upheld that determination, even though

there was no fraud or deception (*id.* at p. 309), based on common notions of unfairness and public policy. The pivotal factor was that "here the competitive method is shown to exploit consumers, children, who are unable to protect themselves." (*Id.* at p. 313.) The exploitation occurred through use of "a device whereby the amount of the return [the children] receive from the expenditure of money is made to depend upon chance." (*Ibid.*). The court deemed this practice to be "contrary to public policy." The court concluded, "It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair.'" (*Ibid.*)

The similarity to the present case is inescapable. If the marketing of candy to children by lottery methods was "unfair" under the provisions of the Federal Trade Commission Act because it violated public policy by luring children into gambling, then the marketing of Camel cigarettes to minors (if that has in fact occurred) may be deemed "unfair" under the comparable provisions of Business and Professions Code section 17200 if it violates public policy by luring minors into unlawfully purchasing and consuming cigarettes.[2]

We conclude, therefore, that Mangini's "targeting of minors" theory, as supported by the factual allegations of the complaint, constitutes a good cause of action under Business and Professions Code section 17200 et seq.

2. Preemption

The remaining question is whether a cause of action for targeting minors in cigarette advertising is preempted by the Federal Cigarette Labeling and Advertising Act.

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[2] Within the present context, the question of "unfairness" under section 17200 would seem to be, as much as anything else, simply one of degree: has Reynolds gone too far in marketing Camel cigarettes? If Reynolds had, for example, presented Teenage Mutant Ninja Turtles on children's lunch boxes to promote cigarette smoking, we have little doubt there would be a statutory cause of action for unfair advertising.

The key to resolution of this question lies in *Cipollone*'s analysis of the claim in that case for fraudulent misrepresentation through false statements and concealment of material facts concerning the health hazards of smoking. The United States Supreme Court held that claim was not preempted because it was "not predicated on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." (*Cipollone* v. *Liggett Group, Inc., supra,* 505 U.S. at p. —— [120 L.Ed.2d at p. 430], quoting 15 U.S.C. § 1334(b).) In reaching this holding, the court noted that "in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud. To the contrary, both the 1965 and 1969 Acts explicitly reserved the FTC's authority to identify and punish deceptive advertising practices—an authority that the FTC had long exercised and continues to exercise." (*Id.* at p. —— [120 L.Ed.2d at p. 430]; see 15 U.S.C. § 1336.) This statutory reservation of FTC authority, the court concluded, "indicates that Congress intended the phrase 'relating to smoking and health' (which was essentially unchanged by the 1969 Act) to be construed narrowly, so as not to proscribe the regulation of deceptive advertising." (*Id.* at p. — [120 L.Ed.2d at pp. 430-431].)

The reservation of FTC authority is not limited to "deceptive" advertising but extends also to "unfair" advertising. The statute provides, "Nothing in" the Federal Cigarette Labeling and Advertising Act "shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to *unfair or deceptive* acts or practices in the advertising of cigarettes." (15 U.S.C. § 1336, italics added.) If, as the court concluded in *Cipollone,* the reservation of FTC authority to identify and punish deceptive advertising indicates Congress intended that the preemptive phrase "based on smoking and health" (15 U.S.C. § 1334(b)) does not proscribe the regulation of deceptive

advertising, then the same must be true for *unfair* advertising. The statutory reservation of FTC authority to identify and punish unfair advertising indicates Congress intended that the phrase "based on smoking and health" does not operate to preempt state regulation of unfair advertising.

We conclude, therefore, that just as a state court action for deceptive advertising is not preempted, a state court action for unfair advertising based on the facts alleged in Mangini's complaint is not preempted. Like the *Cipollone* theory of fraudulent misrepresentation that was not "based on smoking and health" within the meaning of the 1969 Act's preemption provision but on the more general duty not to deceive, Mangini's "targeting of minors" theory of unfair advertising is not "based on smoking and health" but on the more general duty not to engage in advertising that is against public policy, oppressive and unscrupulous, and harmful to consumers.

This brings us to a final point on preemption. The issue in *Cipollone* was whether state court *common law damages* claims were preempted. The present litigation, in contrast, is a statutory action for injunctive relief. Does that make any difference?

The answer is no. The concern in *Cipollone* was whether the Federal Cigarette Labeling and Advertising Act preempts common law damages actions *as well as* positive enactments by legislatures and administrative agencies. The court concluded that common law damages actions are preempted by the 1969 Act, but the scope of such preemption is limited by the language of the 1969 preemption clause, and each claim must be examined individually to determine whether it is within the scope of preemption. (*Cipollone* v. *Liggett Group, Inc., supra*, 505 U.S. at p. —— [120 L.Ed.2d at pp. 426-427].) The court did not address the scope of preemption of positive enactments such as statutes, but the analysis must be the same: if a state statutory cause of

action is outside the scope of the express federal preemption provisions, it is not preempted. "[T]he preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in [the preemption provisions] of each Act." (*Id.* at p. —— [120 L.Ed.2d at p. 423].) The express statutory provisions defining the preemptive reach of the 1965 and 1969 Acts "impl[y] that matters beyond that reach are not preempted." (*Ibid.*) If this is true for common law damages actions, it must be true for statutory actions for injunctive relief.

Thus, if a cause of action for unfair advertising is beyond the scope of the preemption language—as we conclude with regard to Mangini's "targeting of minors" theory due to its predication on a general duty not "based on smoking and health"—it makes no difference whether the cause of action arises from the common law or a state statute, or whether the plaintiff seeks damages or injunctive relief. The sole inquiry is whether the action is encompassed by the preemptive language of the Federal Cigarette Labeling and Advertising Act. If it is not, as we conclude here, there is no preemption.[3]

3. Conclusion

We have come full circle, back to the question whether the facts alleged in the complaint indicate Mangini has a good cause of action which is imperfectly pleaded. The

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[3] Indeed, Justice Scalia's concurrence and dissent in *Cipollone*, which urges complete preemption of state court common law damages claims, recognizes that the court's decision leaves the door open to state court statutory actions as well as common law actions. In arguing against the decision's method of evaluating whether a legal duty is "based on smoking and health" by focusing on the ultimate source of the duty—i.e., whether the law from which the duty derives is directed only to smoking and health—Justice Scalia points out that this approach extends beyond the common law to permit regulation under general state statutes that, like Business and Professions Code section 17200 et seq., proscribe unfair trade practices. (*Cipollone* v. *Liggett Group, Inc.*, *supra*, 505 U.S. at p. — [120 L.Ed.2d at pp. 446-447].)

answer is yes. The alleged facts support a legal theory of unfair advertising under Business and Professions Code section 17200 et seq.—that the Old Joe Camel advertising campaign targets minors for the purpose of inducing and increasing their illegal purchase of cigarettes. This theory is not subject to preemption by the Federal Cigarette Labeling and Advertising Act, because it is not "based on smoking and health" but on a more general duty not to engage in advertising that is against public policy, oppressive and unscrupulous, and harmful to consumers. It is reasonably possible the complaint can be amended to cure the pleading defect; a cognizable cause of action can be stated through amendment of the complaint to set forth Mangini's "targeting" theory on the existing factual allegations. The trial court was required to afford Mangini that opportunity before granting a motion for summary judgment which simply tested the complaint's facial sufficiency. (*Kirby* v. *Albert D. Seeno Construction Co., supra*, 11 Cal.App.4th at pp. 1067, 1069; *Williams* v. *Braslow, supra*, 179 Cal.App.3d at p. 774.)

The trial court's comments from the bench indicate where the court went astray. In concluding that "you are dead in the water" if the underpinning of a state law claim is "advertising or promotion" of cigarettes (*ante*, at p. 7), the court erred by focusing solely on the "advertising or promotion" element of the 1969 Act's preemption provisions. (15 U.S.C. § 1334(b).) That element is only one part of the equation. *Cipollone* draws no bright lines amenable to easy application, but close scrutiny of the decision reveals that preemption is a four-part proposition, demanding (1) a requirement or prohibition, (2) based on smoking and health, (3) imposed under state law, and (4) with respect to advertising or promotion. (15 U.S.C. § 1334(b); *Cipollone* v. *Liggett Group, Inc., supra*, 505 U.S. at p. —— [120 L.Ed.2d at p. 427].) The trial court erroneously ended its preemption inquiry after considering but one element of that

four-part proposition while ignoring the other three. Careful analysis of the factual allegations of Mangini's complaint, the *Cipollone* decision, and the law of unfair competition under Business and Professions Code section 17200 et seq. reveals that Mangini can amend her complaint to allege a valid legal theory which is beyond the scope of federal preemption due to the absence of the "based on smoking and health" element and the presence of advertising and promotion which by reason of its oppressive and unscrupulous nature is harmful to consumers and violative of public policy. She must be given an opportunity to do so.[4]

We stress, however, that within the present procedural context—appeal from a summary judgment which is equivalent to judgment on the pleadings—we have merely assumed the truth of the factual allegations in Mangini's complaint. (See, e.g., *Stockton Newspapers, Inc.* v. *Redevelopment Agency* (1985) 171 Cal.App.3d 95, 99.) Proof of those allegations is another matter entirely. In order to prevail on the merits, Mangini must establish a link between the Old Joe Camel advertising campaign and the consumption of cigarettes by minors. That link, no doubt, will be hotly contested by Reynolds.

C. *The First Amendment Issue*

Finally, we point out that the only issue before us, and the only one we decide, is whether it is reasonably possible Mangini can state a good cause of action under Business and Professions Code section 17200 et seq. which is not preempted by the Federal Cigarette Labeling and Advertising Act. An entirely separate issue is whether

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[4] Indeed, as a practical matter it would now be pointless to deprive Mangini of the opportunity to amend. The Old Joe Camel advertising campaign is still ongoing. Thus, as defense Counsel conceded at oral argument, even if the present judgment were affirmed, a new, properly pleaded action could be filed by a different plaintiff. Affirmance would merely delay the inevitable. Sooner or later, the "targeting" theory must be confronted on its merits.

state law restrictions on the Old Joe Camel advertising campaign would violate the "limited form of First Amendment protection" afforded to commercial speech that "concerns a lawful activity and is not misleading or fraudulent." (*Posadas de Puerto Rico Assoc.* v. *Tourism Co.* (1986) 478 U.S. 328, 340.) Such speech "may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." (*Ibid.*; see *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n* (1980) 447 U.S. 557, 566.) Here, on this point, factual questions are implicated. For example, whether there is a substantial governmental interest in restriction depends on the link shown between the Old Joe Camel advertisements and the consumption of cigarettes by minors. Thus, resolution of the First Amendment issue must await the development of a factual record below.[5]

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[5] Mangini raises other issues, pertaining to a postjudgment costs award, of which our consideration would also be premature. She argues that the court erred in awarding Reynolds fees of $4,625 it paid for deposing a doctor who had written an article quoted in the complaint, for two reasons. First, she argues the deposition was not "necessary" within the meaning of Code of Civil Procedure section 1033.5, subdivision (a)(3) (which specifies costs associated with "necessary depositions"), because the deposition had no bearing on the federal preemption issue pending before the trial court. Second, she argues any such fee award should have been limited to $35 per day under Government Code section 68093 (which specifies that amount for a witness's attendance at "a civil action or proceeding in the superior, municipal, and justice courts") rather than the $250 per hour afforded by the court. She also challenges the inclusion of a $124 filing fee for a federal court removal petition, on the ground removal was found to be improvident and thus the fee was not "necessary" to defense of the case. Because we reverse the judgment—and the costs award along with it—in order to give Mangini an opportunity to amend her complaint, we need not resolve these costs issues in conjunction with our decision whether to reverse. And because we cannot know who will ultimately be the prevailing party entitled to costs in this case (Code Civ. Proc., § 1032, subd. (b)), we cannot conclude that these costs

IV. DISPOSITION

The judgment is reversed, and the cause is remanded with directions to the superior court to give Mangini an opportunity to amend her complaint. Mangini shall recover her costs on appeal.

CERTIFIED FOR PUBLICATION:

KING, J.

We concur:

PETERSON, P. J.

HANING, J.

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issues should presently be addressed as being "necessary to the final determination of the case" (Code Civ. Proc., § 43).

[Filed Aug. 4, 1992]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

No. 939 359

JANET C. MANGINI,
Plaintiff,

v.

R.J. REYNOLDS TOBACCO COMPANY; R.J.R. NABISCO, INC.; MCCANN ERICKSON USA, INC.; YOUNG & RUBICAM INC.; DOES 1-500, inclusive,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On August 4, 1992, the motion of Defendants R.J. Reynolds Tobacco Company, McCann Erickson USA, Inc., and Young & Rubicam Inc. (collectively "Defendants") for an order granting summary judgment came on regularly for hearing before this Court, Honorable Lucy McCabe, presiding.

After full consideration of the moving, opposing, and reply papers of the parties, the arguments of counsel presented at the hearing, and the evidence of record, this Court finds:

That Plaintiff's claims as a matter of law are preempted by the federal Cigarette Labeling and Advertising Act. This doctrine of federal preemption presents a question of law that is applied to Plaintiff's claims without reference to any disputed material facts. There is no triable issue as to any material fact with respect to federal pre-

emption, and Defendants are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that summary judgment shall be entered in favor of Defendants.

DATED: August 4, 1992

/s/ Lucy Kelly McCabe
HONORABLE LUCY MCCABE
Judge
San Francisco Superior Court

[Filed Aug. 2, 1993]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION: 5

A059253

San Francisco County No. 939359

MANGINI, JANET C.

VS.

R.J. REYNOLDS TOBACCO COMPANY, *et al.*

BY THE COURT:

The petition for rehearing is denied.

Dated: Aug. 2, 1993

/s/ Haning, J.

[Filed Jan. 7, 1992]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

No. 939359

JANET C. MANGINI, on behalf of the general public,
Plaintiff,

v.

R. J. REYNOLDS TOBACCO COMPANY; R.J.R. NABISCO INC.; MCCANN ERICKSON USA, INC.; YOUNG & RUBICAM INC., DOES 1-500, inclusive,
Defendants.

FIRST AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF

1. Unfair, Unlawful Business Practices; and

2. Unjust Enrichment and Imposition of a Constructive Trust.

Plaintiff, by her attorneys, alleges all on information and belief, except those allegations which pertain to the named plaintiff or to her attorneys, which are alleged on personal knowledge, as follows:

THE FACTS

"Old Joe, that hip cartoon camel used to advertise Camel cigarettes, is now as familiar to young children as Mickey Mouse, and apparently is enticing thousands of teens to smoke that brand . . . Old Joe came on the advertising scene in 1988. Since then the brand's popularity with teenagers has surged 66-

fold . . . say three studies published Wednesday [December 11, 1991] in the Journal of the American Medical Association." (*San Francisco Examiner*, December 12, 1991, p.1.)

1. In an unlawful and unconscionable attempt to end-run federal prohibitions and requirements on cigarette advertising and California's prohibitions against unfair business practices, R.J. Reynolds Tobacco Company, the manufacturer of Camel cigarettes, launched a series of Old Joe Camel advertisements which do *not* contain the required warnings that cigarettes pose lethal health hazards. As examples:

(a) The Old Joe Camel matchbook entitled "Joe's Smooth Philosophy" offers this advice "On Cheap Cigarettes":

"Forget about 'em. Bum a Camel instead."

(A copy of this matchbook is attached as part of Exhibit A attached hereto).

(b) At least ten matchbooks advertise Camel cigarettes. Not one contains any warning of the hazards of smoking cigarettes. (*See*, Exhibit A).

(c) Thousands of stores in California have an "out" exit sign advertising Camel cigarettes with Old Joe Camel logo and the words "Smooth Character." Again there is no warning. (*See*, Exhibit B attached hereto).

2. In addition, R.J. Reynolds Tobacco Company has launched the Camel Cash advertising campaign in which monopoly-like money emblazoned with Old Joe Camel and a pack of Camel cigarettes as insignia (*See* Exhibit C & C1 [reverse of C] attached hereto) can be exchanged for a pack of cigarettes, a lighter, a baseball cap, T-shirts, a mug, and other items which use Old Joe Camel to advertise Camel cigarettes. Importantly, neither the advertisement for the Camel Cash give away (*See* Exhibit D attached hereto) nor the Camel Cash (Exhibit C), con-

tain any warning as to the health hazards of cigarettes. The Camel Cash gift items are literally walking advertisements for Camel cigarettes. For example, the 75th birthday Camel mug has a picture of Old Joe Camel manfully dragging on a Camel cigarette. There is *no* warning. The Old Joe Camel soft-drink can-holder also portrays Joe manfully dragging on a Camel. There is *no* warning.

THE HAZARDS OF CIGARETTES

3. Virtually every authority and expert in the world, except those employed by the tobacco companies, recognizes that cigarettes are lethal.

4. In the United States cigarettes will kill more people in a year than all the deaths from crack, heroin, alcohol, homicides, suicides, car accidents and AIDS combined. Tobacco is responsible for one in five deaths. It is responsible for 10% of all infant and newborn deaths, 18% of all strokes, 21% of all cancers, and 41% of all heart disease in people under the age of 65. It is responsible for 82% of all chronic lung disease and 85% of all lung cancer.

5. Tobacco addiction is primarily a children's disease. About 75 percent of all adult smokers become addicted before their 18th birthday. Dr. John P. Pierce, a cancer prevention specialist at the University of California at San Diego, concluded that the studies on the effectiveness of Old Joe Camel "strongly suggests that advertising causes children to become addicted to cigarettes." Dr. Pierce and others, in their most recent article in the Journal of the American Medical Association (JAMA) of December 11, 1991 state:

> "One brand that has undergone a major new advertising campaign is Camel. Camel cigarettes were first introduced in 1913 by R.J. Reynolds (RJR), and their advertising approach remained unchanged until 1988, with such themes as 'Camel. Where a

man belongs.' However, in February 1988, RJR decided to update the Camel image and introduced the 'smooth character' multimedia advertising campaign, which features a cartoon camel. It has been claimed that, since the introduction of this campaign in 1988, 'the character has reversed the fortunes of Camel cigarettes, now the No. 6 brand in the $40 billion market' and that the 'smooth character is proving just how much a well-executed image blitz can do for a decrepit brand.' *The Tobacco Reporter* also indicated how this campaign halted slumping sales, 'contributing to a hefty 14 percent change in the brand's market share since 1990.'

Several public health professionals have claimed that this advertising campaign targets children in particular. Even within the tobacco industry, one hears some suggestions that the new Camel campaign does just that. Berg quotes a 'source close to Marlboro' as having said: 'When you see teenagers boys—people the cigarette companies aren't supposed to be targeting in the first place—going crazy for this guy [the cartoon camel], you know they're [RJR] hitting their target. The RJR Company has countered by claiming that 'Camel smokers are principally white males over the age of 21 years.'

* * * * *

We conclude that tobacco advertising, particularly of Camel cigarettes, has been effective in targeting adolescents in the United States. . . . Our results suggest that tobacco advertising is causally related to young people becoming addicted to cigarettes; the sum of this evidence is considerable although not yet complete. Also, there is strong evidence that most smokers become addicted when they are minors and do not understand the long-term consequences of smoking. Overcoming this addiction is a lifelong struggle for many smokers, and the failure rate for

> cessation attempts is extremely high. Unless those responsible for protecting our young take action quickly, the declines that we have seen recently in the proportion of our youngsters who start to smoke may be in jeopardy. Given the potential harm to the health of future generations, public policy should, as a matter of urgency, extend the ban on tobacco advertising to cover not only electronic media but also all other forms of cigarette advertising and promotion."

John Pierce, Ph.D.; Elizabeth Gilpin, M.S.; David M. Burns, M.D.; Elizabeth Whalen, M.A.; Bradley Rosbrook, MS; Donald Shopland; Michael Johnson, Ph.D. *Does Tobacco Advertising Target Young People to Start Smoking? Evidence From California*, JAMA, December 11, 1991, pp. 3154-55; 3157-58. (footnotes omitted). (Attached hereto as Exhibit E, and incorporated herein).

THE TOBACCO COMPANIES NEED NEW CUSTOMERS

6. The tobacco industry is dying. Every day its products kill thousands of its best customers.

7. In order to attract a new generation of victims, the R.J. Reynolds Tobacco Company left no avenue unexplored, including the use of advertisements for Old Joe Camel.

8. As a result of the Old Joe Camel campaign the number of teenage smokers who choose Camel cigarettes has risen from 0.5 percent in 1988 to between 25 percent and 33 percent today. One study estimates that teen smokers account for $476 million of Camel sales now, compared with just $6 million four (4) years ago.

> "In 1988, R.J.R. Nabisco launched the 'smooth character' advertising campaign, featuring Old Joe, a cartoon camel modeled after James Bond and Don Johnson of 'Miami Vice.' Many industry analysts

believe that the goal of this campaign is to reposition Camel to compete with Philip Morris' Marlboro brand for the illegal children's market segment."

Joseph D. Franza, M.D.; John W. Richards, Jr., M.D.; Paul M. Paulman, M.D.; Nancy Wolf-Gillespie, M.A.; Christopher Fletcher, M.D.; Robert D. Jaffe, M.D.; David Murray, Ph.D., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, JAMA, December 11, 1991, p. 3149. (*See*, Exhibit F, attached hereto and incorporated herein).

Astonishingly, Maura Payne, a spokeswoman for the R.J. Reynolds Tobacco Co., the maker of Camel's, said the company did not have information on sales of cigarettes to children. "We purposely exclude it" from market research, said Payne. "We don't want to know what would motivate children to smoke." (*San Francisco Examiner*, December 11, 1991, p. A-3).

The effectiveness on the Joe Camel campaign has not been lost on the advertising industry. "There is no doubt it's a strong and effective campaign, what it's done is to break through the clutter the sameness of cigarette advertising," said John E. O'Toole, President and Chief Executive of the American Association of Advertising Agencies in New York. (*New York Times*, December 12, 1991, Sec. C, p.1).

JURISDICTION AND VENUE

9. The relief sought by plaintiff is subject to the jurisdiction of this court. Venue is proper in this court since millions of dollars of Camel cigarettes are sold in San Francisco County, California, as a result of the Old Joe Camel advertising campaign, defendant McCann Erickson USA, Inc., maintains a business office in San Francisco, and the Old Joe Camel advertising campaign has been executed, in part, in the State of California, and in the City and County of San Francisco.

PARTIES

10. Plaintiff JANET C. MANGINI brings this action, pursuant to California Business and Professions Code § 17204, as a private attorney general, and is a resident of the City and County of San Francisco.

11. Defendant R.J. REYNOLDS TOBACCO COMPANY is a New Jersey corporation with its principal place of business located at Fourth and Main streets, Winston-Salem, North Carolina. Defendant R.J. REYNOLDS TOBACCO COMPANY manufactures and sells Camel cigarettes. R.J. REYNOLDS TOBACCO COMPANY is licensed to do, and does business, in the state of California, and in the City and County of San Francisco.

12. Defendant R.J.R. NABISCO, Inc. is a Delaware corporation with its principal place of business located at 9 West 57th Street, New York, New York. Defendant R.J.R. NABISCO is the parent of R.J. REYNOLDS TOBACCO COMPANY. R.J.R. NABISCO, Inc. is licensed to do, and does business, in the state of California, and in the City and County of San Francisco.

13. Defendant McCANN ERICKSON USA, INC., is a Delaware Corporation has its principal place of business at 750 Third Avenue, New York New York and was responsible in part for the Old Joe Camel advertising campaign which has been executed, in part, in the state of California, and in the City and County of San Francisco.

14. Defendant YOUNG & RUBICAM, Inc. is a New York Corporation has its principal place of business at 285 Madison Avenue, New York, New York and was responsible in part for the Old Joe Camel advertising campaign which has been executed, in part, in the state of California, and in the City and County of San Francisco. Defendant YOUNG & RUBICAM, INC., has its place of business in San Francisco County at 100 First Street, San Francisco, California.

15. The true names and capacities of defendants sued herein under California Code of Civil Procedure § 474 as Does 1 through 500, inclusive, are presently not known to plaintiffs, who therefore sue these defendants by such fictitious names. Plaintiffs will seek to amend this Complaint and include these Doe defendants' true names and capacities when they are ascertained. Each of the fictitiously named defendants is responsible in some manner for the conduct alleged herein and for the damages suffered by plaintiffs and the class they seek to represent.

16. At all times herein mentioned in the causes of action alleged herein, each and every defendant was an agent and/or employee of each and every other defendant. In doing the things alleged herein, each and every defendant was acting within the course and scope of this agency or employment and was acting with the consent, permission, and authorization of each of the remaining defendants. All actions of each defendant as alleged herein were ratified and approved by every other defendant or their officers or managing agents.

FIRST CAUSE OF ACTION
(Unlawful, Unfair Business Practices)
(Against All Defendants)

17. Plaintiff incorporates by reference paragraphs 1 to 16 of the complaint as if set forth fully herein.

18. As alleged in the preceding paragraphs, defendants caused the advertisements of Camel cigarettes without any warning that cigarettes pose a health hazard. Such advertisements violate the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1333(a)(2)) which prohibits advertising cigarettes without a health warning, and constitute an unlawful and unfair business practice under California Business and Professions Code §§ 17200 *et seq.*

19. Plaintiff, pursuant to California Business and Professions Code § 17203 seeks an order of this court enjoining defendants from failing or refusing to:

(a) Undertake a corrective advertising campaign on television stations in California which warn consumers of the health hazards associated with cigarette smoking. Such broadcast campaign should be shown at such times and in sufficient number so as to negate the effect unlawful Old Joe Camel advertisements; and

(b) A corrective a print media campaign warning consumers of the health hazards of smoking. Said print campaign shall be published prominently and in sufficient number so as to negate the effect of the unlawful Old Joe Camel advertisements; and

SECOND CAUSE OF ACTION
(Unjust Enrichment And Imposition of Constructive Trust)
(Against All Defendants)

20. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 1 through 19 of the complaint.

21. As a result of the unlawful conduct described above, defendants have been and will be unjustly enriched. Specifically, defendants R.J. NABISCO, INC., and R.J. REYNOLDS TOBACCO COMPANY have been unjustly enriched by the receipt of millions of dollars in sales and profits from sales of millions of packs and cartons of cigarettes in the United States sold in large part through the unlawful advertisements described herein. In addition, defendants McCANN ERICKSON, USA, INC. and YOUNG & RUBICAM, INC. have been unjustly enriched by their receipt of payments for their participation in the creation and/or dissemination of the obviously illegal Old Joe Camel advertising campaign.

22. Unless enjoined, plaintiff believes defendants will transfer and/or dissipate the proceeds from such sales beyond the jurisdiction of this court. Defendants should therefore be required to disgorge the profits they have obtained and will unjustly obtain and a constructive

trust should be imposed on all revenues thus far obtained by defendants as a result of such illegal payments and sales of cigarettes.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment and relief as follows:

1. An order enjoining defendants from failing or refusing to:

(a) Undertake a corrective advertising campaign on television stations in California which warn consumers of the health hazards associated with cigarette smoking. This broadcast campaign shall be shown in sufficient number and at such times as to negate the effect of the unlawful Old Joe Camel advertisements; and

(b) A corrective print media campaign warning consumers of the health hazards of smoking. Said print campaign shall be published prominently and in sufficient number so as to negate the effect of the unlawful Old Joe Camel advertisements.

2. An order enjoining defendants from pursuing the policies, acts, and practices complained of herein, and imposing a constructive trust upon defendants' ill-gotten gains, and from failing and refusing to disgorge all funds acquired by means of any act or practice declared by this court to be unlawful;

3. For interest on all funds restored to the public;

4. For reasonable attorneys' fees and costs of suit; and

5. For such other and further relief as the court deems just and proper.

Dated: January 7, 1992

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Supreme Court, U.S.
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No. 94-571

In The

Supreme Court of the United States

October Term, 1994

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Petitioners,

vs.

JANET C. MANGINI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a state like California which prohibits the purchase or possession of cigarettes by minors, does Section 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), pre-empt a civil action alleging that the defendant cigarette company engaged in an unlawful and unfair business practice by advertising its product in a manner which targets minors, encouraging them to violate the law?

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I. OPINIONS BELOW AND JURISDICTION

Respondent accepts petitioners' statement of the opinions below. Respondent disputes petitioners' statement of jurisdiction in that it is argued in Section V.A. below that the requirements of 28 U.S.C. § 1257(a) have not been satisfied.

II. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Business & Professions Code § 17200:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

California Business & Professions Code § 17203:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money, or property, real or personal, which may have been acquired by means of such unfair competition.

California Penal Code § 31:

> WHO ARE PRINCIPALS. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

California Penal Code § 308:

> (a) Every person, firm or corporation which knowingly sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any

other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars ($200) for the first offense, five hundred dollars ($500) for the second offense, and one thousand dollars ($1,000) for the third offense.

* * *

(b) Every person under the age of 18 years who purchases or receives any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking of tobacco, products prepared from tobacco, or any controlled substance shall, upon conviction, be punished by a fine of fifty dollars ($50) or 25 hours of community service work.

III. STATEMENT OF THE CASE

Plaintiff/respondent Janet Mangini initially filed a complaint in California superior court alleging that defendant/petitioner R.J. Reynolds Tobacco Co. ("Reynolds"), the maker of "Camel" cigarettes, was engaging in an unfair and unlawful business practice under California law (California Business & Professions Code § 17200 *et seq.*) because much of the paraphernalia associated with its "Old Joe Camel" advertising campaign

contained no federal health warning.[1] Appendix, Petition for a Writ of Certiorari ("Petn. App.") at 48a-49a, 54a. Among other facts, Mangini alleged that since the introduction of the "Old Joe Camel" cartoon figure in 1988, the portion of the teenage market which smoked Camel cigarettes increased from less than one percent to between 25 and 33 percent. Petn. App. at 51a. Following this Court's decision in *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992), Reynolds successfully moved for judgment on the pleadings[2] on grounds that Mangini's claim was pre-empted by 15 U.S.C. § 1334(b).

On appeal to the California Court of Appeal, Mangini asserted, *inter alia*, that leave to amend the complaint should have been granted to permit allegation of a different but related § 17200 claim based on evidence that the "Old Joe Camel" promotional campaign targets minors and encourages them to illegally purchase and smoke cigarettes.[3]

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[1] Also named as defendants were the advertising agencies which helped Reynolds develop the "Old Joe Camel" marketing campaign.

[2] Reynolds mistakenly labeled its motion in the trial court as a motion for summary judgment, and continues to do so in its Petition. As the California Court of Appeal noted in ruling that amendment of the complaint should be permitted, a defense motion for summary judgment which seeks to test the facial sufficiency of the complaint "is in legal effect a motion for judgment on the pleadings" under California law. Petn. App. at 29a.

[3] Plaintiff Janet Mangini admittedly suffered no individual injury as a result of the "Old Joe Camel" advertising campaign. She brought this action as a "private attorney general" pursuant to California Business & Professions Code § 17204 which, for

The Court of Appeal held that leave to amend the complaint should have been granted, and that such allegations would state a cause of action which would not be pre-empted by 15 U.S.C. § 1334(b).[4]

In a unanimous opinion limited to the pre-emption issue, the California Supreme Court affirmed. The court characterized Reynolds' position as follows:

> Reynolds argues that because its cigarettes are labeled in conformity with federal law, California may not impose any regulation with respect to advertising the cigarettes if the regulation is "based on smoking and health." The prohibition against selling cigarettes to minors is based on underlying health concerns, the argument continues, and therefore the state may not impose any requirement or prohibition with respect to advertisements of cigarettes that target minors.

---

purposes of a § 17200 action, accords standing to "any person" to sue on behalf of "the general public." *See, e.g., Consumers Union of United States, Inc. v. Fisher Development, Inc.*, 208 Cal. App. 3d 1433, 1439 (1989). Section 17200 is a broad remedial statute which has been interpreted "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 111 (1972). Reynolds previously attempted to remove the case to federal court, but the district court remanded the action because of concerns over federal court Article III standing limitations. *See Mangini v. R.J. Reynolds Tobacco Co.*, 793 F. Supp. 925, 928-30 (N.D. Cal. 1992).

[4] Thus, the complaint attached to the Petition, Petn. App. at 47a-57a, is not the operative complaint for purposes of the pre-emption analysis.

> Reynolds contends, in effect, that if it had used billboards depicting Old Joe Camel stating in huge block letters, "Kids, be the first in your fourth grade class cool enough to smoke Camels," . . . California could do nothing about it, for any attempt to do so would be a requirement or prohibition "based on smoking and health."

Petn. App. at 12a. In rejecting Reynolds' argument, the California Supreme Court reasoned:

> [I]t is unlawful in California to sell cigarettes to minors or for minors to buy them. Advertising aimed at such unlawful conduct would assist vendors in violating the law. The predicate duty is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law. In *Cipollone*, the predicate duty – not to deceive – was not "based on smoking and health"; this one is similarly not. "Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to" unfairly assist or advertise illegal conduct. (*Cipollone, supra*, 505 U.S. at p. ___ [112 S. Ct. at p. 2624].) This action is therefore not preempted.

Petn. App. at 14a.

IV. SUMMARY OF ARGUMENT

This case is based on a rather unremarkable and universally accepted proposition: You cannot encourage someone to violate the law.

Virtually every state has enacted laws which prohibit persons from advising or encouraging others to commit

illegal acts. Most often these laws are viewed as necessary corollaries of the underlying criminal statutes, such that the person encouraging the unlawful conduct is liable to the same extent as the perpetrator. Thus, California's Penal Code § 31 defines as "principals," "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act . . . or, not being present, *have advised and encouraged its commission* . . . . "[5] (Emphasis added.)

California, like practically every other state, prohibits minors from purchasing or possessing tobacco products. *See* California Penal Code § 308(b). Reynolds concedes that the pre-emption language of 15 U.S.C. § 1334(b) has no effect on a state's ability to limit or prohibit the distribution of cigarettes to, or the consumption of cigarettes by, minors. Indeed, both this Court's *Cipollone* decision and the California Supreme Court decision in this case quoted legislative history from the Public Health Cigarette Smoking Act of 1969 (which added the present wording of § 1334(b)), commenting that the statute was " 'narrowly phrased' " and " 'would in no way affect the power of any State . . . with respect to . . . the sale of

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[5] The quoted portion of Penal Code § 31 makes the encourager liable regardless of the age of the actual perpetrator. Another portion of § 31 makes it unlawful simply to "encourag[e] children under the age of fourteen years . . . to commit any crime," apparently in reference to the provisions of Penal Code § 26 which generally make children under 14 incapable of committing crimes. In addition to making the encourager liable for the underlying crime, many states like California have enacted separate statutes prohibiting conduct which contributes to the delinquency of a minor. *See* California Penal Code § 272. These statutes often provide for enhanced punishment where the defendant encourages a minor to violate the law.

cigarettes to minors. . . .' S.Rep. No. 91-566, p. 12." *Cipollone*, 112 S. Ct. at 2624 n.26; *see also* Petn. App. at 16a.[6]

It would therefore seem to follow that in states like California, it would be unlawful to encourage minors to smoke. Not so, says Reynolds, at least not if the offending party is a tobacco company and the encouragement takes the form of cigarette advertising and promotions targeting minors. Reynolds claims immunity because 15 U.S.C. § 1334(b) pre-empts state law to the extent it imposes a "requirement or prohibition based on smoking and health" with respect to the advertising and promotion of cigarettes. Reynolds asserts that because the underlying prohibition on minors using tobacco can be said to have been motivated in part by concerns about "smoking and health,"[7] California is powerless to prevent Reynolds and other tobacco companies from encouraging minors to violate a statute which Reynolds concedes California has every right to enact and enforce.

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[6] Recent federal legislation goes even further. 42 U.S.C. § 300x-26 provides for monetary grants to states which enact and enforce laws prohibiting the sale or distribution of tobacco products to minors. Moreover, states receiving such grants must agree to develop "strategies to discourage the use of . . . tobacco products by individuals to whom it is unlawful to sell or distribute such . . . products." 42 U.S.C. § 300x-22(b)(2)(B).

[7] As the California Supreme Court's opinion makes clear, when California Penal Code § 308 was originally enacted in 1891, it quite plainly was not motivated by the health risks of tobacco, which were largely unknown at that time. Petn. App. at 15a.

Reynolds' argument is directly contrary to this Court's decision in *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992), which was correctly construed and strictly followed by the California Supreme Court in this case. In *Cipollone*, a clear majority of the Court explained that the pre-emption language of § 1334(b) should be "construed narrowly," consistent with the "strong presumption against pre-emption." *Id.* at 2621, 2624 (plurality opn.) and 2625-26 (Blackmun, J.). Consistent with this narrow construction, the Court held that a claim based on fraudulent advertisements was not pre-empted. The plurality concluded that such a cause of action is not "based on smoking and health" but rather on the more general obligation "not to deceive." *Id.* at 2624. Similarly here, the cause of action asserted by plaintiff is not "based on smoking and health" but rather on the more general obligation not to encourage illegal conduct, particularly among minors. Reynolds' arguments to the contrary are merely an attempt to re-fight a battle already lost in *Cipollone*.

Even if there were a legitimate issue presented by Reynolds' petition, there are additional reasons why a grant of certiorari would be inappropriate. 28 U.S.C. § 1257 limits this Court's appellate jurisdiction to "final judgments" of the highest state court. Given its procedural posture, it is at best questionable whether there is even jurisdiction to hear this case. In any event, the record contains no complaint embodying the challenged theory and the California Supreme Court opinion expressly contemplates the possibility of additional unresolved issues of federal pre-emption. A grant of certiorari

at this point would therefore be both premature and unwise.

V. REASONS FOR DENYING THE PETITION

A. Even Were An Important Legal Issue Presented By The Petition, Statutory Limitations On This Court's Jurisdiction As Well As Prudential Considerations Counsel Against A Grant Of Certiorari

In this case, the California appellate courts resolved a preliminary pleading issue, ruling that plaintiff Mangini should be granted leave to amend her complaint to replead a cause of action under California Business & Professions Code § 17200 based on evidence that Reynolds' "Old Joe Camel" advertisements target minors and encourage them to smoke cigarettes illegally. Further proceedings in the California superior court will determine whether Mangini can prove those allegations. The procedural posture of this case suggests this Court has no jurisdiction to grant a writ of certiorari or, at a minimum, that there are prudential reasons for denying the writ at this time.

Consistent with the "final judgment" limitation on its jurisdiction to review state court decisions by writ of certiorari, 28 U.S.C. § 1257(a), this Court generally does not review cases in which further proceedings will take place in state court. To say such further proceedings will take place here is a gross understatement, as the case is in its infancy. The record on which the California Supreme Court based its decision contains no operative complaint;

the judgment was reversed for failure to allow an amendment. The only issue which has been decided is pre-emption, based on a hypothetical complaint. Indeed, even that issue was not completely decided, as the California Supreme Court left for another day the question of whether particular types of injunctive relief might be pre-empted. Petn. App. at 20a ("Any challenge to a particular remedy, should plaintiff prevail on the merits, is premature.").

Interpreting 28 U.S.C. § 1257(a), this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), identified four situations in which a state court decision on a federal question might be deemed final notwithstanding that additional state proceedings will take place. The first three are facially inapplicable here. Defining the relatively broad fourth category, the Court referred to

> situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, *if a refusal immediately to review the state court decision might seriously erode federal policy*, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83 (emphasis added).

Respondent submits there is no federal policy which would be "seriously erode[d]" if immediate review were denied. It is rather unlikely that the California Supreme Court's decision will chill socially desirable conduct by persons other than Reynolds or subvert important federal interests. *Compare, e.g., Cox Broadcasting*, 420 U.S. at 486 (state court decision limiting freedom of the press); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (same); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988) (state court decision permitting state regulation of federal nuclear facility). Indeed, "[a] contrary conclusion would permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981).

Even if jurisdiction theoretically exists, the procedural posture of this case simply makes it an inappropriate candidate for certiorari. Assuming there is any issue which warrants review by this Court, such review should take place at the conclusion of the case following the filing of a complaint embodying plaintiff's theories, the development of a full evidentiary record, and the resolution by California courts of any remaining preemption issues.

B. The California Supreme Court Correctly Applied This Court's *Cipollone* Decision In Holding That 15 U.S.C. § 1334(b) Does Not Preclude A State From Prohibiting Conduct Which Encourages Illegal Acts

Although Reynolds complains about the *Cipollone* plurality's "frequent shift in the level of generality," 112 S. Ct. at 2631 (Blackmun, J.), *see* Petition for a Writ of

Certiorari ("Petn.") at 11, any alleged shifting in *Cipollone* is more than matched by Reynolds' dogged attempts to shift focus away from what is the real issue in this case. As was plainly recognized by the California Supreme Court, that issue is whether state laws prohibiting persons from encouraging minors to break the law by purchasing or possessing cigarettes are "based on smoking and health" and therefore pre-empted under 15 U.S.C. § 1334(b). Notwithstanding Reynolds' persistent diversions, the controlling question is *not* whether the underlying statute – California Penal Code § 308(b), which prohibits minors from purchasing or possessing tobacco products – was enacted for health-related reasons.

Even more clearly here than in *Cipollone*, the California prohibition at issue is not based on "smoking and health." Rather it is based on the duty (expressed directly in California Penal Code §§ 31 and 272, and indirectly in Business & Professions Code § 17200 *et seq.*) not to encourage illegal conduct, in this case smoking by minors. The fact that the underlying illegality may be prohibited in part because of concerns with the health of minors is irrelevant. The state law which limits *Reynolds'* conduct "with respect to the advertising or promotion of . . . cigarettes," 15 U.S.C. § 1334(b), is based exclusively on the legitimate state interest in assuring that unlawful acts are not encouraged.

It is important to recognize that the issue presented by this case can arise in contexts other than smoking by minors. Reynolds has conceded, as it must, that Congress understood and expressly contemplated that the states would retain their traditional police power not only to

prohibit smoking by minors but also to limit where smoking is permitted by adults. *See Cipollone*, 112 S. Ct. at 2624 n.26 (quoting S. Rep. No. 91-566, p. 12). Accepting Reynolds' pre-emption argument necessarily means that states would be powerless to stop a cigarette advertising campaign encouraging smokers to ignore state or local regulations which prohibit smoking in venues such as hospitals, restaurants, theaters and government buildings because the underlying prohibition is to some extent "based on smoking and health."[8]

Consistent with the strong presumption against pre-emption recognized by this Court in *Cipollone*, it certainly cannot be said that § 1334(b) expresses " 'the clear and manifest purpose of Congress' " to pre-empt all state

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[8] The breadth of Reynolds' argument is not even limited to advertising, for § 1334(b) speaks of the "advertising *or* promotion" of cigarettes. Thus, statutes such as California Penal Code § 308(b) and California Health & Safety Code § 25967, which significantly limit the promotional distribution of tobacco products, would also be pre-empted under Reynolds' expansive pre-emption theory because the statutes' underlying purpose – preventing minors' access to tobacco products – may be motivated in part by health concerns. In addition, it is questionable whether a statute such as California Penal Code § 308(c), which requires cigarette retailers to post copies of the statute prohibiting sales to or purchases by minors, would survive Reynolds' overbroad pre-emption theory.

Interestingly, a tobacco industry-sponsored initiative on the California ballot in November, 1994 – Proposition 188 – would ban billboards advertising tobacco products within 500 feet of schools. Under Reynolds' theory of pre-emption, why is not such a law also a "prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes . . . ?" 15 U.S.C. § 1334(b).

laws which prohibit the encouragement of illegal conduct related to smoking. *See Cipollone*, 112 S. Ct. at 2617 (plurality opn.) and 2626 (Blackmun, J.) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

C. Reynolds' Asserted Reasons For A Grant Of Certiorari Are Based On A Mischaracterization Of The California Supreme Court's Rationale And A Misreading Of This Court's Decision In *Cipollone*

Reynolds' arguments in support of its request for certiorari consistently ignore the critical issue in this case as outlined above. For instance, Reynolds claims that the California Supreme Court erred in undertaking a "facial" pre-emption analysis and in failing "to determine whether respondent's claim is 'based on smoking and health' in the specific circumstances of this case." Petn. at 8. In doing so, Reynolds takes issue with the analysis of the *Cipollone* plurality, implicitly suggesting (although never actually arguing) that the three concurring justices who joined Justice Blackmun's opinion would conclude that both the fraud claims in *Cipollone* and the claims in this action are "based on smoking and health." In a variant on this theme, Reynolds attempts to construct a separate argument that because respondent Mangini might seek various forms of injunctive relief, the three justices concurring in Justice Blackmun's opinion would conclude that Mangini's claims, unlike the claims in *Cipollone*, are pre-empted.

Charitably characterized, Reynolds' misreading of Justice Blackmun's opinion in *Cipollone* is wishful thinking. Because he concluded that a common law damage action was not a "requirement or prohibition" within the meaning of the statute, Justice Blackmun had no occasion to construe the phrase "based on smoking and health." As the California Supreme Court observed, however:

> Nothing in Justice Blackmun's opinion suggests that he would find more preemption regarding injunctions than the majority, and certainly nothing suggesting [sic] he would leave the states powerless to combat advertising targeting minors. Indeed, Justice Blackmun argued that the 1965 statute "can bear only one meaning: that States are prohibited merely from 'mandating particular cautionary statements . . . in cigarette advertisements' "; and that "there is no suggestion in the legislative history that Congress intended to expand the scope of the preemption provision when it amended the statute in 1969." (*Cipollone, supra*, 505 U.S. at pp. ___, ___ [112 S. Ct. at pp. 2626, 2629] (conc. & dis. opn. of Blackmun, J.).)

Petn. App. at 19a-20a. To accept Reynolds' argument is to ignore the language and reasoning of Justice Blackmun's opinion.

Nor is it true that both the plurality in *Cipollone* and the California Supreme Court in this case engaged in merely a "facial" analysis of the pre-emption issue. As is clear from its discussion of the failure-to-warn claims, the plurality in *Cipollone* viewed § 1334(b) as pre-empting a state's ability to dictate how cigarettes are marketed, but only with respect to limited issues directly related to

"smoking and health." Thus, a failure-to-warn claim was pre-empted because it was necessarily based on an assertion that cigarette advertising "should have included additional, or more clearly stated, warnings." *Cipollone*, 112 S. Ct. at 2621. A state ban on fraudulent affirmative misrepresentations, however, presented a different issue because the state would not be involved in dictating the specific content of cigarette advertising. Rather, it simply stated that to the extent tobacco advertisers chose to speak on the issue of smoking and health, they were bound to do so truthfully. As we have explained, the allegations here present an even clearer case for concluding that the state prohibition at issue is not "based on smoking and health" but rather on the distinct and more general obligation not to encourage illegal conduct.[9]

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[9] Nodding in the direction of the *Cipollone* plurality, Reynolds argues that even if a "facial" pre-emption analysis is appropriate, it can only be justified by the plurality's reference to the "single, uniform standard" which underlies common law fraud claims. Reynolds argues that a similar rationale does not support Mangini's claim under California's "unfair business practice" statute because "unfairness" is subject to varying interpretations. Petn. at 12-13.

Mangini does not assert that every conceivable "unfair business practice" claim based on tobacco advertising is necessarily insulated from pre-emption analysis. To borrow a page from Reynolds' book, the claim must be considered "as applied" to the facts of a particular case. Although a claim that Reynolds engaged in an unfair business practice by failing to provide potential purchasers with detailed health warnings might well be pre-empted, Mangini's unfair business practice claim must be analyzed for pre-emption purposes in the same way as would a prosecution under California Penal Code §§ 31, 308(b) or 272: Does 15 U.S.C. § 1334(b) pre-empt a state statute which prohibits persons from encouraging minors to violate the law by

Finally, Reynolds' reliance on *Vango Media, Inc. v. City of New York*, No. 93-7607, 1994 U.S. App. LEXIS 23709 (2d Cir. August 26, 1994) again demonstrates Reynolds' misplaced focus as well as the lengths to which Reynolds will go to concoct a purported conflict. *Vango Media* involved a New York City ordinance requiring the display of one anti-smoking health advertisement on city-licensed taxicabs for every four cigarette advertisements similarly displayed. The Second Circuit concluded that the ordinance constituted a requirement "based on smoking and health" in that it effectively required that anti-smoking health warnings accompany cigarette advertising, precisely the type of state activity § 1334(b) was enacted to pre-empt.[10] Here, in contrast, plaintiff's claim involves no regulation of the content of cigarette advertising based on health concerns. *See* Petn. App. at 14a ("State law prohibitions against advertisements targeting minors do not require Reynolds to adopt any particular label or advertisement 'with respect to any relationship between smoking and health' . . . . "). The only state regulation at issue is based on the independent non-health-based principle

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smoking? As the California Supreme Court concluded, resolution of this issue invokes a standard no less uniform than the fraud claims approved in *Cipollone*. Petn. App. at 14a-15a.

[10] The Second Circuit properly rejected New York City's argument that pre-emption could be avoided because the ordinance was passed with the goal of reducing the significant economic costs to New York City taxpayers occasioned by smoking. As the *Vango Media* court recognized, however, not only were the mandated anti-smoking messages health related, but the economic costs cited by the City were also health related. 1994 U.S. App. LEXIS at *14-15.

that smoking by minors is illegal and illegal conduct should not be encouraged.

VI. CONCLUSION

Cipollone, decided less than three years ago, controls the result here. In one of the first tobacco-related cases to interpret *Cipollone*, the California Supreme Court was faced with a state claim which, even more clearly than the fraud claims approved by seven justices in *Cipollone*, was not "based on smoking and health" within the meaning of 15 U.S.C. § 1334(b). Rather it is based on the fundamental state interest in preventing persons from encouraging others to violate the law. It would be astonishing to think that Congress, in enacting a cigarette labeling law, intended to insulate tobacco companies from state liability for encouraging minors to violate state laws which Congress approvingly recognized in 1969 and more recently has encouraged states to enforce. *See* 42 U.S.C. §§ 300x-22 and 300x-26; *see also* Petn. App. at 17a. Indeed, Reynolds can cite absolutely no evidence to suggest any such Congressional intent. Consistent with the strong presumption against pre-emption recognized by this Court in *Cipollone*, a unanimous California Supreme Court correctly concluded that respondent Janet Mangini's proposed action was not pre-empted.

Accordingly, Reynolds' Petition for a Writ of Certiorari should be denied.

DATED: October 28, 1994 Respectfully submitted,

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No. 94-571

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,
Petitioners,
v.
JANET C. MANGINI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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REPLY BRIEF FOR PETITIONERS

The petition for certiorari identifies three distinct reasons why this Court should review the California Supreme Court's decision that Section 5(b) of the Federal Cigarette Labeling and Advertising Act ("Labeling Act") does not preempt state-law claims to enjoin cigarette advertising allegedly targeted at minors. Respondent offers only the most perfunctory discussion of these grounds for review. On two of them, respondent rests on incorrect assertions about *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). And on the third, respondent all but concedes the conflict between the California Supreme Court decision and *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). Respondent is also mistaken in her principal arguments that this Court lacks jurisdiction and that the decision below is correct on the merits.

1. Respondent is wrong to contend that the decision below is not "final" within the meaning of 28 U.S.C. § 1257. Opp. 11-12. The California Supreme Court has "finally decided" the question whether Section 5(b) preempts state-law claims for unfair targeting of minors, and a reversal of its decision "would be preclusive of any further litigation." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). This Court has not hesitated to assume jurisdiction in cases where, as here, a state supreme court has rejected a claim of federal preemption and then remanded for further proceedings under state law. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497-98 n.5 (1983); *Construction Laborers v. Curry*, 371 U.S. 542, 543-50 (1963). *See also Mitchell v. Forsyth*, 472 U.S. 511, 525 n.8 (1985) ("[S]tate-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257.").

Despite this authority, respondent asserts that the California Supreme Court decision will not " 'seriously erode federal policy,' " and thus falls outside this Court's jurisdiction. Opp. 11 (quoting *Cox Broadcasting*, 420 U.S. at 483). But by denying preemptive effect to Section 5(b), the decision below would supplant uniform federal regulation of cigarette advertising with "diverse, nonuniform, and confusing" state and local regulation—the very problem that the Labeling Act expressly sought to avoid. 15 U.S.C. § 1331(2)(B). Respondent does not even suggest that the unfair targeting claims approved below would rest on uniform standards nationwide. As we have explained at length, they clearly would not. Pet. 11-14.

Recent events confirm the rapidly mounting threat to Congress's stated interest in uniform federal regulation of cigarette advertising. Within the past year alone, at

least seven jurisdictions have seen attempts to prohibit or enjoin cigarette advertising allegedly targeted at minors. *See* Pet. App. 1a-21a (California); *Moore ex rel. Mississippi v. American Tobacco Co.*, No. 94-1429 (Jackson Co. Chancery Court) (Mississippi); Colford, *Tobacco Marketers Burned by State Plans*, Advertising Age 48 (March 7, 1994) (Vermont); *Sparks v. R.J. Reynolds Tobacco Co.*, No. C94-783C (W.D. Wash.) (Washington); *McGraw ex rel. West Virginia v. American Tobacco Co.*, No. 94-1707 (Kahawha Co. Circuit Court) (West Virginia); *Penn Advertising v. City of Baltimore*, 1994 U.S. Dist. LEXIS 13120 (D. Md. Aug. 11, 1994) (Baltimore), appeal pending (4th Cir. No. 94-2141); Teinowitz & Jensen, *Colorado City May Expel Joe Camel*, Advertising Age 46 (April 11, 1994) (Snowmass, Colorado). These efforts are part of an ongoing attack on the tobacco industry and its advertising currently being waged in many jurisdictions by state attorneys general,[1] private attorneys general,[2] state and local lawmakers,[3] and plaintiffs' personal injury lawyers.[4]

Unless the California Supreme Court decision is reversed, the attacks on cigarette advertising can be expected to multiply. Indeed, respondent herself contends that the decision approves targeting claims "in contexts

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[1] *See, e.g., Moore, supra; McGraw, supra; Humphrey ex rel. Minnesota v. Philip Morris Inc.*, No. C1-94-8565 (Ramsey County, Minnesota District Court).

[2] *See, e.g.*, Pet. App. 1a-21a; *Sparks, supra.*

[3] *See, e.g., Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994); *Penn Advertising, supra;* Colford, *supra;* Teinowitz & Jensen, *supra.*

[4] *See, e.g., Castano v. American Tobacco Co.*, 1994 U.S. Dist. LEXIS 13438 (E.D. La. Sept. 22, 1994) (putative class action on behalf of "tens of millions" of past and present smokers); *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273-CA(20) (Dade County, Florida Circuit Court) (putative class action on behalf of "millions" of smokers).

other than smoking by minors." Opp. 13. She argues that jurisdictions prohibiting smoking in hospitals, restaurants, theaters or government buildings also can prohibit advertising that might encourage such smoking (presumably, for example, by depicting doctors, diners, moviegoers or bureaucrats smoking). Opp. 14. It is difficult to imagine a more serious erosion of the federal policy, which Congress has enacted into law, against "diverse, nonuniform, and confusing" state and local regulation of cigarette advertising.

2. Rather than addressing the three specific grounds for review raised in the petition for certiorari, respondent complains that the petition "attempts to shift focus away" from what she perceives as "the real issue in this case." Opp. 13. Respondent's own attempts to divert attention from the arguments raised in the petition, however, rest on misreadings of both *Cipollone* and the California Supreme Court opinion.

A. We have explained at length why this Court should review the California Supreme Court's decision to apply only a facial preemption analysis to unfair targeting claims challenged under Section 5(b). Pet. 8-14. In *Cipollone* itself, five Justices stressed that using facial review to evaluate fraud claims is inconsistent with using as-applied review to evaluate failure to warn claims (112 S. Ct. at 2631 (Blackmun, J.); *id.* at 2636 (Scalia, J.)); two Justices urged using as-applied review for all claims (*id.* at 2636-37); and four Justices, while reviewing fraud claims only facially, did so because those claims, unlike respondent's, rest on a "single, uniform standard" nationwide (112 S. Ct. at 2624 (plurality opinion)).

Respondent attempts to reconcile the California Supreme Court decision with *Cipollone* by misconstruing this Court's decision in three important ways. First, respondent denies that the plurality "engaged in merely a 'facial' analysis" of the fraud claims. Opp. 16. But the plurality explicitly refused to "analyze fraud claims at

the lowest level of generality" (112 S. Ct. at 2624 n.27 (plurality opinion)), rejecting Justice Scalia's proposal to determine whether such claims are "based on smoking and health" in their "proximate application" (*id.* at 2636 (Scalia, J.)).[5] Second, respondent denies that the plurality limited its facial approach to claims involving a "single, uniform standard." Opp. 17 n.9. But the plurality explicitly stated that this approach "is appropriate" because fraud claims, unlike failure to warn claims, "rely on only a single, uniform standard: falsity." 112 S. Ct. at 2624 (plurality opinion). Third, respondent contends that the plurality distinguished fraud claims on the ground that they would merely prohibit certain advertising, without involving the state "in dictating the specific content of cigarette advertising." Opp. 17. Apart from finding no support in the plurality opinion, that distinction is flatly inconsistent with Section 5(b) itself, which preempts not only state-imposed "requirement[s]" for cigarette advertising, but state-imposed "prohibition[s]" as well.[6]

In applying only facial scrutiny to determine whether claims of unfair targeting are "based on smoking and health," the California Supreme Court decision represents a significant departure from *Cipollone*, where two Justices embraced as-applied review for all claims challenged

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[5] Respondent also denies that the California Supreme Court "engaged in merely a 'facial' analysis" of her unfair targeting claim. Opp. 16. That court, however, found "dispositive" the facial analysis of fraud claims advanced by the *Cipollone* plurality. Pet. App. 13a. Indeed, the court acknowledged that respondent's claims were health-based as applied in this case. Pet. App. 15a (noting "the health concerns that fuel this lawsuit").

[6] Indeed, *Cipollone* held that Section 5(b) preempts fraud claims "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." 112 S. Ct. at 2623 (plurality opinion). Characterizing such a *"prohibition"* as "merely the converse of a state law *requirement*" to provide warnings, the plurality stressed that Section 5(b) "pre-empts both requirements and prohibitions." *Id.* (emphases in original).

under Section 5(b), 112 S. Ct. at 2636-37 (Scalia, J.), and four Justices embraced as-applied review for claims, such as failure to warn and unfair targeting, that do not rest on a "single, uniform standard," 112 S. Ct. at 2623-24 (plurality opinion). Respondent provides no support for her one-sentence assertion that unfair targeting claims "invok[e] a standard no less uniform than the fraud claims approved in *Cipollone*." Opp. 18 n.9. As we have explained in detail, respondent is clearly mistaken. Pet. 11-14.

B. Respondent makes no attempt to defend the California Supreme Court's counterintuitive conclusion that the legal predicate of her unfair targeting claim, California Penal Code Section 308, which prohibits the sale of cigarettes to minors, is not "based on smoking and health" for federal preemption purposes. Nor does respondent attempt to reconcile the California Supreme Court's analysis on this point with *Perez v. Campbell*, 402 U.S. 637 (1971), *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), or *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). These cases establish that a state statute is preempted if it has any purpose or effect forbidden by federal law, even if the legislature has articulated, or was motivated by, a permissible purpose as well. Pet. 15-17. By contrast, the California Supreme Court held that Section 308, despite its undisputed public health purpose (Pet. 17-19), is not "based on smoking and health" because its distant predecessor might have been enacted to serve an additional interest in public morality. Pet. App. 15a.

Respondent attempts to dismiss as "irrelevant" the "fact," which she does not seriously dispute, that Section 308 was enacted or amended "in part because of concerns with the health of minors." Opp. 13. *See also id.* ("[T]he controlling question is *not* whether [Section 308] was enacted for health-related reasons."). The California Supreme Court, however, rejected respondent's view that tar-

geting claims are not preempted even if based on underlying tobacco restrictions that are themselves health-based. The California Court of Appeal had embraced this position, holding that targeting claims could arise out of tobacco restrictions that are health-based on their face. Pet. App. 34a-35a (citing provisions from California Health & Safety Code § 25967). The California Supreme Court, however, "did not rely on those provisions in finding no preemption, but on Penal Code section 308," which it proceeded to determine was not health-based. Pet. App. 15a. Respondent's argument notwithstanding, the decision below plainly rests on a determination that Section 308 is not "based on smoking and health."

Ignoring *Perez* and *Gade* entirely, respondent also attempts to distinguish *Vango Media* because that case involved an ordinance "requiring the display" of certain anti-smoking messages, whereas the " 'prohibitio[n]' " against targeting does not " 'require Reynolds to adopt any particular label or advertisement.' " Opp. 18 (quoting Pet. App. 14a). Once again, respondent forgets that Section 5(b) by its terms encompasses health-based "prohibition[s]" as well as health-based "requirement[s]." [7]

C. Finally, respondent does not seriously challenge our contention that review is warranted to assess the conflict between the California Supreme Court decision and *American Airlines, Inc. v. Wolens*, 589 N.E.2d 533 (Ill.), *vacated*, 113 S. Ct. 32 (1992), *reinstated*, 626 N.E.2d 205 (Ill. 1993), *cert. granted*, 114 S. Ct. 1396 (1994). *Wolens*, as we have explained, addresses the question whether assertedly "general" state statutes should be ana-

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[7] In any event, the ordinance in *Vango Media* could, as a practical matter, operate as a "prohibition." That ordinance requires certain advertisers to display, without compensation and at their own expense, one anti-smoking message for every four cigarette advertisements. *See* 34 F.3d at 70. Faced with this substantial economic disincentive, covered advertisers might simply give up cigarette advertising entirely.

lyzed any differently, for express preemption purposes, depending on whether damages or injunctive claims are at issue. Pet. 19-21. Respondent briefly asserts that *Cipollone* did not distinguish between injunctive and damages claims. Opp. 15. *Cipollone* involved only damages claims, however, and the Court simply had no occasion to address the application of Section 5(b) to injunctive claims.

3. Respondent devotes most of her opposition to arguing that the decision below is correct on the merits. She reasons that if a state restricts particular sales or uses of cigarettes, as California has done with respect to minors, then it may also prohibit advertising that might encourage the restricted sales or uses. Opp. 6-9, 12-15.

To begin with, respondent's position makes little sense as a conceptual matter. An advertising prohibition that is imposed to help enforce a specific sales restriction surely advances the same purpose as that sales restriction. Thus, if respondent's unfair targeting claim is based on Section 308 (as the California Supreme Court has held), and if Section 308 is "based on smoking and health" (as respondent all but concedes), then the targeting claim likewise must be "based on smoking and health."

Moreover, respondent's position would entirely eviscerate the federal statutory scheme. By its terms, Section 5(b) preempts *all* health-based restrictions on cigarette advertising, but *no* health-based restrictions on the sale or use of cigarettes.[8] Yet under respondent's theory, a state or municipality, acting upon health-based motives, could impose any cigarette advertising restrictions that it desired, as long as it first imposed an underlying sales or

[8] Section 5(b) provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

use restriction. A state could always accomplish in two steps what it could not do in one. Needless to say, respondent fails to explain how this startling result is consistent with either the specific text of Section 5(b), which provides that "[n]o" health-based advertising restrictions are permissible, or the underlying policy of the Labeling Act, which seeks to prevent "diverse, nonuniform, and confusing" state regulation of cigarette advertising.[9]

4. Finally, the petition should be held pending resolution of *Freightliner Corp. v. Myrick*, No. 94-286, 63 U.S.L.W. 3291 (U.S. Oct. 7, 1994) (granting certiorari). *Freightliner* presents the question whether courts may find implied preemption, based on an actual conflict between state and federal law, if the federal statute at issue contains an express preemption provision. Both the Eleventh Circuit in *Freightliner* and the California Supreme Court in this case construed *Cipollone* to foreclose the possibility of impled conflict preemption under these circumstances. *See Myrick v. Fruehauf Corp.*, 13 F.3d 1516, 1522 (11th Cir. 1994) ("[W]hen there is an express pre-emption provision we should not consider implied pre-emption"); Pet. App. 10a (refusing to consider implied preemption "[b]ecause Congress enacted an express preemption provision"). If *Freightliner* should modify that understanding

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[9] Through her frequent citation of aphorisms, *e.g.*, Opp. 6 ("You cannot encourage someone to violate the law."), respondent voices apparent disapproval of Congress's choice to preempt health-based advertising restrictions, but not sales or use restrictions. In fact, however, that policy judgment is perfectly sensible. A cigarette retailer can feasibly obey local sales restrictions in any state or municipality where it chooses to do business. On the other hand, at least if it wishes to advertise through widely circulated publications, a cigarette manufacturer cannot easily tailor its advertisements to take account of variations in the laws of every jurisdiction where the advertisements might be read. Thus, to protect the national economy where necessary, and to preserve local authority where possible, Congress chose to preempt only health-based state regulation of cigarette "advertising or promotion."

of *Cipollone*, then this case should be remanded for reconsideration.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] If available, implied preemption analysis would almost certainly encompass the targeting claim at issue in this case. *See, e.g., Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 186-88 (3d Cir. 1986) (*"Cipollone I"*) (Labeling Act impliedly preempts all claims challenging "the propriety of a party's actions with respect to the advertising or promotion of cigarettes"), *cert. denied*, 484 U.S. 976 (1987); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234-35 (6th Cir. 1988) (following *Cipollone I*); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987) (same).